

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-5025-6

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-5025-6

In the Matter of
CONTINENTAL VENDING MACHINE CORP. and
CONTINENTAL APCO, INC.,

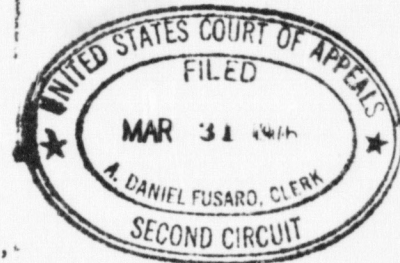
Debtors.

JAMES TALCOTT, INC.,

Appellant,

IRVING L. WHARTON, TRUSTEE,

Appellee.



ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPENDIX

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RELEVANT DOCKET ENTRIES
RE: CONTINENTAL VENDING MACHINE CORP.

		Clerk's Document <u>No.</u>
7/10/63	Creditors' Petition for Reorganization pursuant to Chapter X - Sec. 127 filed.	(2)
7/12/63	By Mishler, Jr. - Order filed approving petition etc. trustees appointed etc. Bond joint and several etc. \$100,000.00	(7)
8/15/63	By Mishler, J. - Order to show cause filed why a contract should not be entered into by which the debtor and/or its subsidiaries will borrow approximately \$650,000.00, and pursuant to which the debtor will offer for sale certain vending routes, etc. Returnable August 16, 1963, before Judge Mishler, at 9:30 A.M.	(38)
8/16/63	Before Mishler, J. - Hearing on order to show cause why order should not be made authorizing the Trustees and Continental Apco Inc., etc. to enter into a contract with James Talcott, Inc., hearing called - held and concluded - Application granted - Trustees to submit order as indicated copy of order to be served on all parties	
8/16/63	By Mishler, J. - Order filed that the motion made herein brought on by order to show cause returnable 8/16/63 for an order authorizing the Trustees and Continental Apco Inc., a wholly owned subsidiary of debtor, to enter into a contract with James Talcott, Inc. dated 8/14/63 be and the same is in all respects granted, etc.	(42)
9/3/63	By Mishler, J. - Order filed resettling order of August 16, 1963 to provide for sale of certain assets free and clear of all liens and encumbrances, etc. (Sale of six vending routes located in Santa Ana, California; San Francisco; Detroit; Buffalo; Hammond, Indiana; and St. Louis, Missouri).	(49)
9/9/63	Before Mishler, J. - Sale of certain routes of debtor pursuant to Order of Mishler, J. of September 3, 1963. San Francisco, California; Santa Ana, California; & Buffalo, New York routes of Continental sold to Dana Vending Co. for the sum of \$2,850,000.00 Settle order on two days notice.	

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Hammond, Indiana route sold to Star Supply Corp. of Chicago, Illinois for the sum of \$330,000.00.
- Cashier's check for \$40,000, accepted as down payment. Settle order on 2 days notice.

Sale of Detroit, Michigan, and St. Louis, Missouri routes adjourned * * *.

- 9/21/63 By Mishler, J. - Order filed confirming sale of California, Buffalo and Indiana Routes, and further directing sale of the Detroit, Michigan and St. Louis, Missouri routes * * *. (59)
- 9/21/63 By Mishler, J. - Order filed making appointment of temporary Trustees John P. Campbell and Irving L. Wharton permanent and that their bonds heretofore given shall be continued. (60)
- 9/30/63 Before Mishler, J. - Sale of Certain Routes of debtor (Detroit, Michigan) pursuant to order of Mishler, Jr. September 3, 1963, etc. The Court accepted the bid of Interstate Vending Co. for \$900,000 on certain conditions: with title to be given them on October 14, 1963. Attorney for trustees to submit an order today; all parties to be given notice of the entry of that order. Hearing held and concluded.
- 10/1/63 By Mishler, J. - Order filed that the sale of the Detroit, Michigan route to Interstate Vending Co. for the sum of \$900,000.00 hereby is in all respects approved, etc. and title closing of said route is fixed for October 14, 1963, etc. and authorizing the Trustees to negotiate for a private sale of St. Louis, Missouri route, etc. and that the Court retains jurisdiction to hear and determine the validity and extent of any and all claims or controversies arising out of the sale, etc. (71)
- 10/14/63 By Mishler, J. - Order filed amending order of October 1, 1963 that sale of Detroit, Michigan route shall be made free and clear of all liens, the said liens, to the extent that they are valid to attach to the proceeds, etc. (76)

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- 11/21/63 By Mishler, J. - Order to show cause filed why an order should not be made herein (1) authorizing John P. Campbell and Irving L. Wharton, Trustees of the Debtor Corporations, etc. to borrow \$750,000.00 from James Talcott, Inc., in which loan Franklin National Bank is to participate, etc. Returnable November 29, 1963, at 9:30 A.M. (87)
- 11/29/63 Before Mishler, J. - Hearing on order to show cause why an order should not be made herein (1) authorizing John P. Campbell and Irving L. Wharton, Trustees of the Debtor Corporations above-named to borrow the sum of etc. Hearing held and continued to December 2, 1963 at 4 P.M.
- 12/2/63 Before Mishler, J. - Hearing on order to show cause why an order should not be made herein (1) authorizing John P. Campbell and Irving L. Wharton, Trustees of the Debtor Corporations above-named, to borrow the sum of etc. Case called. Hearing resumed and continued to December 3, 1963 at 10:00 A.M.
- 12/4/63 Before Mishler, J. - Hearing on order to show cause why an order should not be made herein (1) authorizing John P. Campbell and Irving L. Wharton, Trustees of the Debtor Corporations, above-named, to borrow the sum of etc. Hearing resumed and concluded. Application granted. Submit order.
- 12/4/63 Before Mishler, J. - Order filed that Trustees' motion to borrow the sum of \$750,000.00 from Talcott for Continental in which loan Franklin is to participate, etc. is granted. (98)
- 12/4/63 Notice of Appeal filed by General Electric Credit Corp. (Note - from order of 12/4/63) (99)
- 12/4/63 Notice of Appeal filed by Marjoric D. Kogan, as Custodian of Barton Kogan (Note - from order of 12/4/63) (101)
- 12/11/63 By Mishler, J. - Order filed that Trustees of the Debtor be authorized to consummate the borrowing of \$200,000.00 by Continental Apco Inc., from James Talcott, Inc. etc. (106)

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12/27/63	Certified copy of order from U. S. Court of Appeals filed that the order of the Detroit Court (<u>Note</u> - 12/4/63) be and it hereby is affirmed.	(112)
12/3/63	By Mishler, J. - Order filed confirming sale of the St. Louis, Missouri route, etc. and fixing title closing for January 3, 1964 at St. Louis, Missouri, etc.	(114)
2/10/64	By Mishler, J. - General Release re: James Talcott, Inc. filed.	(127)
9/4/64	Application of John P. Campbell for resignation as Trustee filed.	(229)
9/14/64	By Mishler, J. - Order filed that resignation of John P. Campbell trustee is hereby accepted; effective as of date of this order; further ordered that Irving L. Wharton be continued as sole trustee, etc. further ordered that John P. Campbell and continuing trustee take necessary steps to effect said resignation, etc.	(232)
10/6/64	By Mishler, J. - Order filed that proofs of claim against Continental Vending Machine Corp., etc. existing on or before April 7, 1963 shall be filed with trustee at office of his counsel * * * on or before Jan. 1, 1965; Proofs of claim against Continental Apco Inc. existing on or before 10/3/63 etc. shall be filed on or before 1/1/65 at same address; Proofs of claim against Conservator of Continental existing on or after 4/8/63 to be filed on or before 1/1/65 at same address; Claims against Trustee of Continental Apco, Inc. existing on or after 10/4/63 shall be filed with the Trustee, etc. on or before 1/1/65.	(239)
12/31/69	By Mishler, Ch. J. - Order to show cause filed returnable Feb. 13, 1970 why an order should not be made and entered which shall determine the rights of (1) all unsecured creditors of <u>Continental Cafeterias of Michigan, Inc.</u> , etc.	(707)

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- 12/31/69 By Mishler, Ch. J. - Order to show cause filed returnable Feb. 13, 1970 * * why an order should not be made which shall determine the rights of (1) all unsecured creditors of Continental St. Louis Corp. etc. (708)
- 12/31/69 By Mishler, Ch. J. - Order to show cause filed returnable Feb. 13, 1970 * * why an order should not be made which shall determine the rights of (1) all unsecured creditors of Continental Lake Vendors Corp. etc. (709)
- 6/29/70 By Mishler, Ch. J. - Order filed authorizing Trustee to compromise and settle controversies in respect of the Detroit, Michigan Vending Machine Route etc. (759)
- 6/29/70 By Mishler, Ch. J. - Order to show cause filed returnable July 10, 1970 * * why an order should not be entered which shall determine the rights of all secured creditors of the former Pittsburgh, Pa. operations of Continental Vending Machine Corp. et al, who held specific liens against property of aforesaid companies located in and about Pittsburgh, Pa. which property was sold on March 10, 1964, etc. (760)
- 7/24/70 Before Mishler, Ch. J. - Order filed authorizing Trustee to compromise and settle controversies in respect of the Hammond, Indiana Vending Machine Route, etc. (768)
- 7/24/70 By Mishler, Ch. J. - Order filed authorizing Trustee to compromise and settle controversies in respect of the St. Louis, Missouri Vending Machine Routes, etc. (769)
- 9/8/70 By Mishler, Ch. J. - Order filed that the agreement and consent of all secured creditors who hold specific liens against properties against Continental Pittsburgh, et al., which was sold on or about March 10, 1964 etc. and provide for the distribution of that certain fund consisting of the balance of the proceeds of the sale and accrued interest thereon, etc. is approved etc. (783)

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- 9/27/72 By Mishler, Ch. J. - Order filed that Irving L. Wharton, as Reorganization Trustee, show cause on Oct. 20, 1972 * * why this Court should not direct trustee to pay James Talcott, Inc. the balance of all obligations owed to said James Talcott, Inc., etc. (883)
- 11/13/72 Affidavit in Opposition of Joseph Marcheso, Atty. for trustee, to petition of James Talcott, Inc. for an order directing trustee to pay Talcott the sum of \$875,487.22 etc. filed (889)
- 12/15/72 Before Mishler, Ch. J. - Order to show cause why the Court should not direct the trustee to pay James Talcott, Inc., etc. Case called - Motion agreed. Decision reserved - affidavits to be submitted
- 2/13/73 By Mishler, Ch. J. - Memorandum of Decision and order filed. Talcott is directed to make a detailed accounting of all moneys etc. on or before 3/1/73. In the event Talcott is unable to account by said date, it shall in lieu thereof pay over to Trustee the sum of \$750,000 and the time is fixed for the accounting shall be extended to and including Apr. 2, 1973 Talcott's motion is in all respects denied (So Ordered) (898)
- 2/16/73 Notice of Appeal filed from order dated Feb. 13, 1973, by the Hon. Jacob Mishler, Chief U.S.D.J., denying application for payment of conservator's and trustees' certificates and granting the trustees' cross-application for an accounting *** (900)
- 2/22/73 By Mishler, Ch. J. - Order to show cause filed that Irving L. Wharton, trustee and his attorney show cause on Feb. 23, 1973 * * why an order should not be made, pursuant to Rule 8 of F.R.A.P. staying the terms and conditions of the order dated 2/13/73 etc. (903)
- 2/23/73 Before Mishler, Ch. J. - Hearing on order to show cause staying order of 1/13/73 etc. Case called. Motion argued. Stay granted on conditionsthat are indicated on the record.

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2/28/73	By Mishler, Ch. J. - Order filed that until final determination of James Talcott, Inc.'s appeal from Court's order, dated 2/13/73, etc. the terms and conditions thereof are stayed on the listed conditions, etc. * * *	(904)
3/7/73	Surety's Undertaking in the sum of \$600,000.00 filed (Federal Insurance Company) (Re: James Talcott, Inc.'s Appeal.	(908)
3/15/73	Affidavit of Mark Rosenbaum, Asst. Vice-President of James Talcott, Inc., dated 3/12/73 filed.	(909)
3/15/73	Affidavit in Support of Services filed by Hahn, Hessen, Margolis & Ryan, Attys. for James Talcott, Inc., received and filed.	(910)
3/19/73	Supplement to Affidavit of Legal Services for James Talcott, Inc. filed.	(911)
4/2/73	Affidavit of George Fairberg, Vice President to James Talcott, Inc. re: auditing and other charges filed.	(915)
5/1/73	Affidavit on Part I of Accounting of Moneys received together with Accounting of James Talcott, Inc. of money received - Part I and filed.	(918)
7/25/73	Affidavit on Part II of Accounting of James Talcott, Inc. of Moneys Received etc. filed.	(926)
3/8/74	Certified copy of judgment of U.S.C.C.A. dated 1/22/74, Ordered that the action is remanded for said District Court for further proceedings in accordance with the opinion of U.S.C.C.A. (We agree with Judge Mishler that Talcott will not be entitled to payment of charges without first submitting a proof of claim and gaining court approval etc. (with copy of opinion attached) filed	(947)
3/21/74	Before Mishler, Ch. J. - Bankruptcy hearing - Case called - Conference held and concluded in chambers.	

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4/10/74	By Mishler, Ch. J. - Memorandum of decision filed. Talcott is directed to submit a proof of claim within 30 days, setting forth the charges for legal, accounting and other miscellaneous expenses for services rendered after the filing of the petition totaling approximately \$628,000. The proof of claim shall explain in detail: (1) the date the services were rendered, etc.	(952)
4/30/74	Proof of Secured Claim of James Talcott, Inc. for charges filed by Hahn, Hessen, Margolis & Ryan, Attorneys for James Talcott, Inc.	(955)
5/22/74	By Mishler, Ch. J. - Memorandum of decision dated April 10, 1974 directed James Talcott to submit a proof of claim within thirty days of date of decision, etc. proof of claim was to contain the date the services were rendered; the nature of the services; the time involved; and the date payment was made. James Talcott claim filed April 30, 1974 did not contain information requested in decision etc. Memorandum of decision dated May 22, 1974 filed. Court now directs James Talcott, Inc. to submit further proof of claim to U.S. Magistrate Vincent A. Catoggio, as Master, etc. Master shall commence hearing issues on or before June 24, 1974 and shall file a report with findings of fact and conclusions of law together with a transcript of the proceedings on or before August 5, 1974 etc. * * *	(959)
6/21/74	Notice of Motion filed returnable July 9th, (12th, per JM) 1974 * * (James Talcott, Inc.) for an order/orders A) in compliance with the Court of Appeals opinion of 1/22/74 remanding the case for further proceedings 1) specifying the nature of such proceedings, if any, to be conducted by the court, etc.	(965)
7/10/74	Affidavit in Opposition filed by Joseph J. Marcheso, Atty. * * *	(968)

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7/12/74	Before Mishler, Ch. J. - Case called. Motion submitted. (see #965). Decision reserved.	
7/16/74	Reply Affidavit filed (Hahn, Hessen, et al., Esqs., Attys. for James Talcott, Inc.)	(969)
8/23/74	Before Mishler, Ch. J. - Case called. Motion argued. Court directs Trustee to file objections to application of funds to the entire account within 5 weeks.	
9/4/74	By Mishler, Ch. J. - Memorandum of Decision and Order filed. Having expressed an opinion concerning the intent of the August 14th agreement, I feel that it is necessary to recuse myself. Accordingly, Talcott's request for an order directing compliance with the Court of Appeals decision and determining the "Silco reserve issue" has been assigned to Hon. Orrin G. Judd under our random selection procedure. The Court is not presently in a position to pass on the validity of Talcott's claim for payment of \$100,000 and, in view of Talcott's refusal to turn over monies claimed by the Trustee, the motion to eliminate the bond and for an order directing payment of at least \$100,000 on account of outstanding certificates is in all respects denied and it is So Ordered.	(973)
4/28/75	Report of Master - Vincent A. Catoggio U.S. Magis. filed.	(1015)
5/15/75	Trustee's Objection to Special Master's report filed.	(1022)
5/23/75	Notice of Motion filed returnable June 13, 1975 * * for an order confirming in all respects the report of Hon. Vincent A. Catoggio, Special Master, etc.	(1025)
6/13/75	Before Mishler, Ch. J. - Motion of James Talcott, Inc. to confirm the Special Master's Report and to overrule Trustee's objections thereto. Motion submitted.	

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- 11/18/75 By Mishler, Ch. J. - Memorandum of Decision and Order filed. The Trustee's objection to the award of \$33,210.05 (to Talcott) is overruled. Conclusion - - the court awards reimbursement to Talcott for 275 hours of services for Hahn, 321 hours by Ryan and 150 hours by Abeson; the court also awards \$90,373.84 for expenses and disbursements by Talcott. The total amount, \$119,108.84, is to be paid as of the date of this order, without interest. It is So Ordered (1055)
- 11/24/75 Notice of Motion filed for reargument of the Memorandum of Decision and Order dated November 18, 1975, pursuant to Rule 9(m) of the General Rules of this Court, etc. Returnable December 3, 1975 * * * (1061)
- 11/24/75 Memorandum of Trustee in Support of his Motion for Reargument filed (Returnable Dec. 3, 1975 * * *) (1062)
- 12/3/75 Notice of Cross-Motion for a rehearing of this Court's Decision and Order dated Nov. 18, 1975 * * (1064)
- 12/3/75 Memorandum of James Talcott, Inc., in Opposition to Trustee's Motion for Reargument filed by Hahn, Hessen, Margolis & Ryan, Attorneys. (1065)
- 12/3/75 Before Mishler, Ch. J. - Motion for reargument, etc. Motion submitted. Decision reserved
- 12/16/75 Letter dated 12/3/75 from Joseph J. Marcheso, Attorney for Trustee, to Mishler, Ch. J. re: recusion of the Judge on 9/4/74 re: Silco Reserve issue, etc. filed (1071)
- 12/16/75 Letter dated 12/3/75 from Hahn, Hessen, et al. Esqs. to Mishler, Ch. J., re: ruling by Judd, J. that Mishler, Ch. J. was a material witness etc. filed. (1072)

RELEVANT DOCKET ENTRIES
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12/16/75	By Mishler, Ch. J. - Memorandum of Decision and Order dated 12/15/75 filed. Payments of the fees and disbursements fixed in this court's order of 11/18/75, is stayed until Talcott has accounted for all the proceeds of the Silco sale. The award shall be a charge against the proceeds, etc. So Ordered.	(1073)
12/16/75	Notice of Appeal by Attys. Hahn, Hessen, Margolis & Ryan filed, for James Talcott, Inc.	(1074)
12/18/75	Notice of appeal from order dated 11/18/75 by Judge Mishler filed.	(1076)
1/29/76	By Judd, J. - Memorandum of Decision dated 1/28/76 filed. The Court finds that the Silco Reserve should be credited in reduction of Continental's indebtedness to Talcott, even though this leaves no surplus to apply to the payment of Conservator's or Trustee's certificates. * * *	(1095)
3/2/76	By Judd, J. - Order filed that Silco Reserve should be credited by Talcott in reduction of Continental's indebtedness to Talcott other than the indebtedness arising from Conservator's and Trustee's Certificates.	(1105)

NOTICE OF TALCOTT'S MOTION FOR MULTIPLE RELIEF

PLEASE TAKE NOTICE that upon the annexed affidavit of J. Jacob Hahn, sworn to the 20th day of June, 1974, James Talcott, Inc. will move this Court, in Courtroom 5, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 9th day of July, 1974 at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order or orders:

- A - In compliance with the Court of Appeals opinion of January 22, 1974, remanding the case for further proceedings, (1) specifying the nature of such proceedings, if any, to be conducted by the court; (2) fixing a date or dates of hearing therein, if any are to be held; (3) making such direction and giving such instructions to counsel as may be appropriate or needful in the further proceedings, in aid of a speedy determination of the entire controversy on the merits.
- B - Determining the Silco reserve issue, with findings and conclusions;
- C - (1) Clarifying this court's memorandum of decision of April 10, 1974, in the respects indicated in paragraph 37 of the annexed affidavit; (2) and if, on such clarification, it should appear that Talcott's consolidation claim is dismissed or denied, directing the trustee to settle an order in extended form, on notice, with findings and conclusions in support of the requirement of notice to creditors on the consolidation issue.
- D - (1) Settling and approving James Talcott, Inc.'s accountings for moneys received, filed in May and July, 1973; (2) or directing the trustee to file any exceptions or objections thereto within fifteen days of such order or be forever barred;

NOTICE OF TALCOTT'S MOTION FOR MULTIPLE RELIEF

- E - Directing the trustee to pay James Talcott, Inc., at least \$100,000 on account of the certificates and as much more as law and equity may require.
- F - Fixing a date of hearing on James Talcott, Inc.'s informal application to vacate that part of this court's order of February 28, 1973, which directed filing of a \$600,000 bond.
- G - Granting James Talcott, Inc. such other and different relief as is just and equitable.

* * * *

AFFIDAVIT IN SUPPORT OF TALCOTT'S MOTION
FOR MULTIPLE RELIEF

J. JACOB HAHN, being duly sworn, deposes and says that:

1. He is senior partner of Hahn, Hessen, Margolis & Ryan, attorneys for James Talcott, Inc. He makes this affidavit in support of Talcott's motion for multiple relief set forth in the annexed notice of motion.

PROCEEDINGS

2. September 25, 1972, Talcott applied for an order directing the trustee to pay a balance of \$875,487.22 due on the trustee's and his predecessor conservator's certificates, as of December 31, 1971, inclusive of interest.

3. By decision and order of February 13, 1973, this court denied Talcott's application and directed it to account by March 1, 1973 for all moneys received from or on account of the debtors. The order provided that if Talcott is unable to account by March 1, 1973, it shall pay \$750,000 to the trustee and the time to account shall be extended to April 2, 1973.

4. Talcott appealed from that order and applied to this court for a stay pending appeal. By order of February 28, 1973, the stay was granted on condition that Talcott file a \$600,000 bond and on specified dates file accountings for all moneys received by it and for all its legal, auditing and other charges.

5. The bond was filed. Accountings for the charges

AFFIDAVIT IN SUPPORT OF TALCOTT'S MOTION
FOR MULTIPLE RELIEF

were filed in March and April, 1973. Accountings for moneys received were filed in May and July, 1973.

6. On January 22, 1974, the Court of Appeals handed down a comprehensive opinion remanding the matter to this court for further proceedings.

7. No further proceedings on remand having been initiated by this court, deponent wrote on March 6, 1974 requesting "a preliminary hearing in the nature of a pre-trial conference." The requested hearing was held on March 21, 1974 (the hearing).

8. On April 10, 1974, this court handed down a memorandum of decision, "deciding" two things: (a) In accord with the Court of Appeals opinion, Talcott was directed to file a proof of claim to supplant the previously filed accounting for legal, auditing and other charges, (b) Creditors should be heard on the consolidation issue.

9. On April 30, 1974, Talcott filed its proof of claim. On May 6, 1974, trustee's counsel wrote to the court objecting to the proof of claim and asking that it be rejected for asserted non-compliance with the April 10, 1974 direction. On May 14, 1974, deponent responded contending that an objection to a claim with request for relief is unauthorized procedure, without a notice of hearing, and criticizing the trustee's indicated litigation by correspondence.

AFFIDAVIT IN SUPPORT OF TALCOTT'S MOTION
FOR MULTIPLE RELIEF

10. On May 16, 1974, this court called for a hearing on May 17, 1974. At such hearing, followed by memorandum of decision dated May 22, 1973, the proof of claim was referred to a Special Master with directions, inter alia, to file his report by August 5, 1974. Commencement of oral testimony on the claim has been set for June 25, 1974.

DELAYS IN DECISION AND
REASONS THEREFOR

11. With the single exception of the reference on the proof of claim for Talcott's charges, there has been no indication of any movement toward a final determination of the controversy upon the merits.

12. Talcott's accounting for moneys received by it has not been acted upon for almost twelve months since its filing in May and July, 1973. Close to five months have passed since the Court of Appeals' January 22, 1974 remand for further proceedings and almost three months since the March 21, 1974 hearing. There has been no intimation of any further proceedings and no indication that the issues are under consideration with a view toward early disposition.

13. At the hearing, four reasons appeared for the delay in decision: difficulty in locating documents; unresolved federal tax claim; difficulty in understanding the issues; supposed absence of accounting.

AFFIDAVIT IN SUPPORT OF TALCOTT'S MOTION
FOR MULTIPLE RELIEF

Documents

14. Difficulty in locating documents was attributed to poor condition of court files.

"Mind you, I have trouble finding documents. We have got cases and cases of files. We have no way of finding them." (36)

"Again, I don't know whether you have been down in the Clerk's office and tried to find anything on Continental * *. I can't send any one down to look for it. I have to go down myself, and when I look at it, I stand there and turn around and go back." (64)

"I may have to rely on hearings, on documents, on agreements, and I don't know where to find them." (65)

15. Counsel were never previously asked to help locate documents in the Clerk's office or to furnish their own copies. There had been no prior intimation of existence of the problem as an impediment to decision.

16. At the hearing, the court asked counsel to furnish certain documents and other data in aid of decision. On March 25, 1974, deponent caused to be delivered to the court the appendix and all briefs in the Court of Appeals, as well as financing agreements. On subsequent inquiry whether any additional materials are needed, the court's message was that none were.

Tax Claim

17. It also appeared at the hearing that this claim has been holding up decision.

AFFIDAVIT IN SUPPORT OF TALCOTT'S MOTION
FOR MULTIPLE RELIEF

"Incidentally nothing can be done here until the government's tax claim is resolved and I thought it might be for a long, long time, * * because if the government got \$20,000,000 we would be talking for nothing." (56)

"I thought that this was the first thing that I had to resolve because I thought that the lien went all the way back and that it had to be resolved first." (57)

18. Deponent denied there is a lien and asserted that the government had only a priority claim, but that whether lien or priority, the claim is subordinate to Talcott's liens and has no effect on the instant controversy (56). Trustee's counsel could not clear up the question of lien (56) and the court did not direct him to do so.

19. From occasional statements at hearings in other proceedings, it appeared that there had been protracted negotiations with government officials on the local level resulting in a settlement of the tax claim at a small fraction of its original amount. It also appeared that the settlement was not consummated because of inaction on the part of the authorities in Washington. The above statements by the court at the hearing were the first intimation that the tax claim has been holding up decision in Talcott's instant controversy with the trustee.

20. At the hearing, the court stated, "apparently that will be disposed of within 30 days", and trustee's counsel amended, "30 to 60 days." (55-56)

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"At any rate, it isn't important, it still has to be resolved. I wouldn't know what testimony to take if I were to hold a hearing. It may very well be that the documents will answer all the questions,"
(57)

21. One hundred days have passed since the hearing and it is not known to deponent whether the tax claim has been finally resolved. And if resolutions of the claims is no longer important to a decision of the instant controversy, it is not known what further proceedings or hearings, if any, are to be held and whether decision is actually in the making.

Issues

22. With respect to the Silco reserve issue, the Court of Appeals opinion was read once (6) and

"I was a little confused by the opinion at the time I read it and I have not read it since it came down." (6)

And with respect to the consolidation issue,

"I'll have to come back to that. I am not prepared to discuss it because I can tell you very frankly that since the last determination I have not looked at the file. * *." (54)

23. The issues and the Court of Appeals opinion were extensively discussed at the hearing. There is no assurance of resulting command of the issues sufficient for decision.

"I think part of the problem is that there hasn't been a definition of the precise

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issues before me. I think we have been jumping all over the lot." (59)

24. The court did not direct counsel to define "the precise issues", in supplement or summary of the discussion of them at the hearing and in the light of the Court of Appeals opinion.

Accounting

25. As stated, Talcott's accountings for moneys received by it were filed in May and July, 1973. Unaware of such filing, the court thought an accounting would help understanding the issues and that the Court of Appeals also required an accounting first.

"You know what I got out of this decision, I think all Judge Mansfield was saying was, 'Now, wait, you are ahead of yourself. Account first and let's see what happens?'" (10)

The Court of Appeals fully understood that an accounting had been filed, expressly referring to "an accounting which it (Talcott) has already given". (1562)

26. Consistent with misapprehension of the Court of Appeals' opinion, the court called for an accounting.

"If you would only account I would probably get a picture of this." (10)

Advised that an accounting had been filed "months ago",

"I have not seen it, or maybe I don't understand it. Where is it filed." (10)

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Told that it "was filed with you and it is in the Clerk's office", (10), the court later referred to its large bulk as a reason for not having considered it.

"I don't know what your accounting shows, but I am not going to go through 10 or 20 hundreds of pages of figures." (42)

27. Deponent believes that once an accounting is filed, it is the party who requested it, not the court, who has the burden of initial review and determination whether it is in anyway objectionable and whether it affords a basis for any relief.

28. Trustee's counsel has never moved with respect to Talcott's accounting. He attributed this to the fact, stated to be known to the court, that "we are now down to a staff of two", adding, "the accounting is under review and as soon as we can, if there are any objections, we will file objections." (66)

29. The court did not ask when this will be done, nor did it fix any time limit. One month later, April 17, 1974, trustee's counsel wrote, "we have not yet concluded a review of the accountings furnished by Talcott." Two more months have now passed and there is still no action on the part of the trustee and no direction on the part of the court.

30. The reorganization proceedings were commenced in 1963. Talcott's liquidation of the debtors' collateral was largely completed in 1964. In course of liquidation Talcott had rendered monthly accountings to the trustee. Throughout

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the proceedings the trustee and his counsel had, and they now have, available to them the services of two qualified competent accountants working, it is believed, full time at the trustee's counsel's office. They are fully familiar with the monthly accountings and the debtors' pertinent books and records. Talcott's new accountings pursuant to order present little or nothing new to them.

SILCO RESERVE

31. This is one of the main issues in this case. It was extensively discussed at the hearing. There is nothing confusing about its treatment and disposition by the Court of Appeals opinion.

(a) It overruled this court's holding that the history and purpose of the August 14, 1963 agreement precluded any intent for Talcott to apply the reserve against Continental's debts. (1559-1560)

(b) It overruled this court's ruling that, by the recital in the order authorizing the August 14, 1963 agreement, the court did, or had the power to, change the agreement which, in the decretal part, it approved "in all respects". (1560-1561)

(c) It overruled this court's view that to allow Talcott to apply the reserve against Continental's debts would be to give Talcott an impermissible preference or priority.

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It rejected this court's assumption that Continental's debts were unsecured and it held that these debts were secured by Talcott's general lien upon the reserve as traceable proceeds of the routes, absent any showing of such lien's invalidity. (1561-1562)

(d) It overruled this court's determination that the August 14, 1963 agreement was unambiguous in providing for application of the reserve against the certificates rather than against Continental's debts. (1558) It held the agreement not unambiguous and it remanded for further proceedings to determine the parties' intent upon appropriate findings and conclusions. (1562)

CONSOLIDATION

32. This is another main issue in this case. There is nothing confusing about its treatment and disposition by the Court of Appeals' opinion. There can be no doubt that the Court of Appeals' had a full grasp of this issue (1554-1555), holding, however, that it would be premature for it "to rule now on this issue" in view of the fact

"that the district court is presently considering the same contention - that Talcott is entitled to treat the debts of Continental as the debts of Apco - in connection with Talcott's objection to confirmation of the trustee's reorganization plan, * * *." (1562)

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33. In the Court of Appeals, trustee's counsel urged inappropriateness of decision because the issue was sub judice in the confirmation proceeding. Deponent responded:

"It is immaterial to Talcott whether the determination of that issue is made in the other proceeding or in this proceeding. Talcott's right to a determination is undoubted and determination cannot be postponed or withheld indefinitely on any consideration of 'sub judice.'"

34. When the Court of Appeals reserved decision because "the district court is presently considering the same contention" in the confirmation proceeding, it was not informed, as deponent was not, that consideration and decision of the consolidation issue was in fact being withheld and postponed because of the unresolved federal tax claim.

35. Reserving decision, the Court of Appeals has indicated the order in which this court should decide the issues: Silco reserve first, then consolidation.

"Talcott will have every opportunity to appeal on this issue if on remand the district court reverses its prior construction of the August 14, 1963, agreement but continues to refuse an order directing payment on the certificates on the ground that the underlying indebtedness should have been reduced from the funds collected by Talcott on Apco's accounts receivable." (1563)

36. In its memorandum of decision of April 10, 1974, following the hearing, this court stated the consolidation issue

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and held:

"This is a substantial issue before the court on Talcott's objection to the plan of reorganization (liquidation). It is a question upon which creditors who would be affected by such a determination should be heard and should not be determined on the unrelated issue involving payment of fees between Talcott and the trustee."

37. The meaning and effect of this holding are not clear. Is Talcott's consolidation claim dismissed or denied? Must Talcott renew the claim de novo on notice? Or is decision on the merits being further withheld and postponed until notice is given at this late date? In any event, exactly when, by whom, to what creditors and in what form is notice to be given?

38. Expressly and impliedly, deponent contended at the hearing (51-52) that creditors have been and are on notice. They had notice of the application for approval of the plan for substantive consolidation, and notice of the extensive hearings, findings and order approving the plan. They had notice of application to confirm the plan, hence notice of Talcott's objection and the grounds therefor. In short, creditors have had notice and every opportunity to be heard on the question of Talcott's asserted right to apply Apco surplus against Continental debts as a necessary legal consequence of consolidation.

39. No creditor objected or otherwise participated

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or asked to be heard at any stage of the proceedings on the plan and Talcott's objection thereto. They have been and are adequately represented by the trustee. The April 10, 1974 decision rejecting Talcott's contentions required findings and conclusions which this court did not make.

CERTIFICATES

40. The amount sought by Talcott, and not disputed, is \$875,487.22 as of December 31, 1971, inclusive of interest. With interest accrued since that date, the amount due is approximately \$1,000,000 (39, 40, 41). And there is no end in sight: interest is steadily accruing with no apparent concern on the part of the trustee or the court.

41. This court's reason for not paying the certificates is "because I thought there might be plenty of * * set-offs" for "legal fees and expenses" that "Somebody said something like \$900,000." (38, 39, 40).

42. Actually, the claimed legal fees and other charges amount to \$375,740.04 as appears in Talcott's proof of claim. With interest, the charges would amount to some \$600,000 or \$700,000, against both debtors. (40)

43. These charges are subject to approval of the court (38), but neither the trustee nor the court would go so far as to suggest the possibility that all charges will be disallowed.

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"No", said the court, "but all right, it's a claim". (40)

44. Any amount of disallowed charges will serve to increase the Apco surplus which would then be offset by the Continental deficit in the event of consolidation, thus leaving unpaid the full amount of the certificates with interest.

45. Furthermore, any amount of disallowed charges cannot serve as a set-off against the certificates. To the extent that the charges will be allowed or disallowed, their only effect will be to increase or decrease Talcott's pre-petition claim against the debtors, whether secured or unsecured. As a matter of law, the trustee's claim against Talcott for any disallowed charges will not be a proper set-off against Talcott's administration claim against the trustee on the certificates. As deponent stated, the pre-petition accounts "had nothing to do with the certificates." (41)

46. Trustee's counsel has contended that pursuant to the financing agreements, the debts underlying the certificates are, in part, payable out of the Apco surplus.

"The Court: Tell me how it would affect the situation if Talcott applied the income in accordance with the borrowing agreement?

Mr. Schlossberg: We would now - the trustee would be obligated on perhaps \$100,000 worth of claimed \$900,000 indebtedness." (16)

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47. Deponent disputes both counsel's contention and his figures. Counsel's admission that on his own terms \$100,000 is indisputably due and payable on the certificates fairly requires prompt payment of at least that amount without waiting for final disposition of the entire controversy.

BOND

48. At the hearing, deponent made an informal application to vacate the order for the \$600,000 bond as being unnecessary in view of Talcott's ample solvency and ability to comply with any possible order to pay moneys to the trustee upon its accounting.

49. The court asked "the trustee to see now if it is still needed" and "Even if you say it is needed, I will have an informal hearing * * " (69). Deponent was asked to furnish a current, latest financial statement. (69)

50. On March 25 and April 16, 1974, respectively, deponent submitted Talcott's financial statement as of December 31, 1972 showing a net worth of \$110,550,064 and one as of December 31, 1973 showing a net worth of \$111,395.748.

51. By letter of April 17, 1974 trustee's counsel advised the court that he cannot consent to a vacatur of the bond order because Talcott is debiting the debtors' accounts with charges including premiums on the bond.

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52. The letter is not responsive to the court's directive for a determination of Talcott's ability to respond on the basis of its financial statements. The additional charges may or may not be ultimately held proper; they cannot possibly make any difference in view of the financial statements.

53. Fairness requires holding the informal hearing on the further need of the bond that the court stated it would hold.

54. On behalf of his client, deponent invokes a litigant's right to a reasonably prompt and final disposition of his claims and in case of decisional complications, problems and delays, the right to be reasonably, but fully and adequately, apprised of the status and posture of his claims under submission.

55. The relief needed and sought includes: (a) determination of what, if any, further proceedings on remand are to be held in accordance with the Court of Appeals opinion; (b) determination of the Silco reserve issue, with findings and conclusions; (c) clarification of the memorandum of decision of April 10, 1974 as stated in paragraph 37 of this affidavit and, if it should be held that the consolidation claim is dismissed or denied, settlement of an order, with findings and conclusions concerning the requirement of notice to creditors; (d) settle-

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ment and approval of the accountings for moneys received or a direction to the trustee to file any exceptions or objections within fifteen days or be forever barred; (e) direction to the trustee to pay at least \$100,000 on the certificates and as much more as law and equity may require; (f) fixing a date for hearing of application to vacate the order for a \$600,000 bond; (g) general relief on these and other matters, as may be indicated by consideration of this motion.

WHEREFORE, deponent prays for an order or orders granting to James Talcott, Inc. the above relief which is enumerated in the annexed notice of motion.

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MORTON J. SCHLOSSBERG, being duly sworn, deposes and says that he is associated with JOSEPH J. MARCHESO, Attorney for IRVING L. WHARTON, Trustee of Continental Vending Machine Corp. and Continental Apco, Inc. and that he submits this affidavit in connection with the Notice of Motion of James Talcott, Inc. dated June 20, 1974.

Talcott, in its Notice of Motion, has requested a direction that certain proceedings be held and that certain specific relief be granted. The Trustee concurs in part in Talcott's application, objects to certain other requests and believes that

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additional proceedings not requested by Talcott are required in order to bring about a final determination of the issues now existing as between the Trustee and Talcott.

With respect to Items A and B of the Notice of Motion, the Trustee concurs that additional proceedings are necessary in order to comply with the opinion of the Court of Appeals dated January 22, 1974. Obviously, the Court of Appeals felt that the record with respect to the Silco reserve was not sufficient for its purposes to either affirm or reverse this court's ruling. Of course, the Trustee believes that the court properly determined the issue of the Silco reserve, but since further proceedings were mandated- we believe that evidentiary hearings dealing with the intent of the August 14, 1963, agreement must be held.

As part of the original proceedings before this court, the Trustee argued that the Silco reserve related only to the loan to the Conservator of Continental in May, 1963. The second facet of that claim involved the Trustee's contention that the June and August 1963 loans to Apco, being secured by the Apco collateral (by virtue of the Apco promissory notes and the incorporation therein of the financing agreements between Apco and Talcott), required Talcott to satisfy these loans out of the proceeds of collateral it now holds in the form of cash. Talcott has taken the position that by virtue of consolidation it had the right to

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apply the Apco collateral to the debt of Continental rather than to the Apco June and August promissory notes. As the Court of Appeals pointed out at pages 1557 and 1562, this issue has not yet been ruled upon by this court. Accordingly, the Trustee believes that hearings in connection with the borrowings which have given rise to the claim asserted by Talcott in its motion of September 25, 1972, must include not only hearings on the application of Silco reserve, but also on the proper application of the Apco collateral as well.

Throughout these proceedings, Talcott has studiously avoided a confrontation on the issue of the Apco collateral it holds and their application to the June and August Apco borrowings. It is the Trustee's belief that Talcott has adopted this course of action only because it can offer no excuse for failing to apply the Apco collateral to satisfaction of the June and August borrowings as required by the promissory notes of Apco. A determination of this issue is vital and hearings thereon should be held in conjunction with hearings dealing with the matter of the Silco reserve.

In Item C of its Notice of Motion, Talcott requests a clarification of the court's decision of April 10, 1974. Talcott's objection to the Trustee's Amended Plan was raised as part of the confirmation proceedings to which notice was given to all creditors. That objection has not yet been ruled upon and if the court feels

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that further notice to creditors may be required before such a ruling, the Trustee will, of course, abide by the court's ruling. In this connection we should advise the court that the Trustee plans a notice to the creditors in September in connection with settlements of the actions against a number of defendants and settlement of the tax claim.

Item D in the Notice of Motion requests approval of Talcott's accountings or direction that objections be filed within 15 days. The accountings furnished by Talcott number approximately 1,000 pages. To the extent that these accountings disclose the amounts received by Talcott, they appear to be basically correct, although some objections are anticipated. However, one of the major considerations in requesting the accountings involved not only an accounting for the receipts but the application of these receipts by Talcott. Fundamental to the application of receipts is an ultimate determination by the court with respect to (1) the Silco reserve, (2) the Apco collateral, and (3) consolidation of debt and its relation to Talcott. Based upon these determinations, either the accounting as filed will serve as the basis for the Trustee's objections or, in the alternative, Talcott will be directed and required to file new accountings setting forth such applications as the court may direct. Accordingly, until such time as the issues referred to above are resolved, the Trustee cannot

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object to the accountings as filed. However, substantial objections to charges imposed by Talcott and to the application of receipts by Talcott will be made by the Trustee. In this connection, I should point out that Talcott has filed, in 1964, an unliquidated proof of claim. Recently, the Trustee requested that Talcott file a liquidated proof of claim and was advised by Talcott's counsel that such could not be done until the questions concerning the Silco reserve and application of the Apco collateral and consolidation were determined. The Trustee finds himself in precisely the same position with respect to Talcott's accountings and requests that the time for him to object to these accountings be deferred until after a ruling is made finally determining the open issues.

The Trustee objects to Talcott's request that a payment of \$100,000 be made on the Trustee's certificates. As I shall amplify at a later point in this affidavit, Talcott's argument in this case is misleading and without foundation. Suffice it to say at this point that the Trustee believes that when an ultimate ruling is made with respect to the Silco reserve and the application of the Apco collateral that the Trustee will not be required to pay any monies on the Trustee's certificates and certainly no money should be paid at this time.

Finally, with respect to Talcott's request in Item F for

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an order vacating the direction that Talcott file a bond, it is the Trustee's position that ultimately, when a final accounting is accepted and approved by the Trustee and the Court, Talcott will be obligated to repay monies to the estates of the debtors. Although the financial statements of Talcott appear to demonstrate that the Company could satisfy any future obligation, recent newspaper accounts of the difficulties encountered by major financial institutions requires the Trustee to urge the court to protect the creditors of the debtors to the fullest extent possible. We believe that the court properly required the posting of the bond and that this protection should be continued at least until a final determination is made vis-a-vis Talcott and the Trustee.

I should now like to briefly direct the Court's attention to several of the statements contained in the supporting affidavit of Talcott's counsel. I believe that it is important for the court to bear in mind with respect to paragraph 2 of the Hahn affidavit, that the alleged balance due to Talcott arises from two loans made to Apco prior to its bankruptcy and merely guaranteed by the Trustee and a third loan made by Talcott to the Conservator of Continental. The Trustee has constantly argued that the two Apco loans must be satisfied out of the Apco collateral and the loan to the Conservator should be satisfied out of the Silco reserve held by Talcott since 1964.

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With respect to paragraph 12 of the Hahn affidavit, I should again point out that the accountings consist of almost 1,000 pages. The Trustee does not have the vast resources available to Talcott to review these detailed accountings. The court should also consider that it took Talcott some five months to prepare these accountings and no criticism should be leveled at the Trustee's two employees upon whom has been imposed the burden of reviewing these documents. In any event, for the reasons previously stated, formal objections to the accountings must necessarily be deferred until there are rulings with respect to the Silco reserve, the Apco collateral, the question of consolidations and the imposition of various charges presently the subject of hearings.

With respect to paragraphs 17-21 of the Hahn affidavit, we have previously advised counsel that the claim of the Internal Revenue Service has now been settled, a stipulation of settlement has been filed with the court and a hearing on this settlement is anticipated to be held in September after notice is sent to the creditors.

The arguments advanced by Mr. Hahn in paragraphs 46 and 47 of his affidavit are based upon statements made by your deponent and taken completely out of context. The court inquired of me as to the amount which would still remain open only in the event that Talcott made a proper application of the Apco collateral. I advised

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the court that if such proper application was made, the June and August borrowings would have been paid in full and the Trustee would have no objection under his guaranties for these loans. The balance of \$100,000 relates solely to the loan to the Conservator in May, 1963 and, as Mr. Hahn and the court fully know, the Trustee has consistently argued that the Silco reserve surplus should have been applied to the satisfaction of this obligation so that as of the current date, this obligation has been paid in full. Accordingly, Mr. Hahn's statement that deponent admitted that \$100,000 is due and payable on the certificates is a total mis-statement of my previous representation to the court, as well as the Trustee's position which has been argued time and time again.

In summary, the Trustee agrees that hearings should be held in connection with the Silco reserve and the application of the Apco collateral. The Trustee agrees that a determination should also be made with respect to Talcott's obligation to the Plan with respect to the issue of consolidation. The Trustee further urges that proceedings in connection with Talcott's accountings be deferred until after these hearings are concluded and rulings made by the court thereon. Trustee objects to the payment of any monies at this time on the Trustee's and/or Conservator's certificates and also objects to the vacature

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of the previous order of the court directing that Talcott file a bond in the amount of \$600,000.

JUDGE MISHLER'S DECISION AND ORDER
SEPTEMBER 4, 1974, ON TALCOTT'S MOTION

This omnibus motion by James Talcott, Inc. (Talcott) seeks the following relief: (A) compliance with the order of the Court of Appeals dated January 22, 1974; (B) determination of "the Silko [sic] reserve issue;" (C) clarification of this court's memorandum of decision dated April 10, 1974; (D) settlement and approval of Talcott's accountings for money received which were filed in May and July, 1973; (E) an order directing the trustee to pay Talcott "at least \$100,000 on account of the certificates"; and (F) a hearing on Talcott's application to vacate this court's order of February 28, 1974 requiring the filing of a \$600,000 bond. Oral argument of the motion was heard by the court on August 23, 1974.

A recital of the pertinent history of the proceedings would be helpful to an understanding of the problems raised by this motion. Continental Vending Machine Corp. (Continental) manufactured vending machines and, through various subsidiary corporations, owned vending machine routes in various parts of

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the country. Continental Apco, Inc. (Apco), a wholly owned subsidiary of Continental, was the sole agent for the sale of Continental's vending machines.

On April 8, 1963, upon the application of the Securities and Exchange Commission, an order was entered by the United States District Court for the Southern District of New York appointing James Campbell as conservator for Continental. On May 29, 1963, Campbell, acting with authorization from Judge Bonsal of the Southern District, borrowed \$175,000 from Talcott for Continental and issued a conservator's certificate guaranteeing repayment of the loan. Talcott loaned \$200,000 to Apco in June 1963 to keep its operations continuing.^{/1} An involuntary petition for the reorganization of Continental under Chapter X of the Bankruptcy Act was filed in this court on July 10, 1963 and approved by the court on July 12, 1963, with Campbell and Irving L. Wharton being appointed as trustees. On August 14, 1963, Campbell^{/2} entered into an agreement with Talcott whereby Talcott agreed to lend Apco "\$650,000 and 5% of gross sales from the date hereof to September 30, 1963 of all machines in which

^{/1} This borrowing was guaranteed by Campbell as conservator of Continental. Through error the order authorizing the guarantee was not issued.

^{/2} The letter was signed by John P. Campbell, President of Continental Apco, Inc.

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[Talcott] has any lien." The agreement stated that the trustees would bring on for sale assets of Continental or of Continental's wholly owned subsidiary in the form of cigarette and music routes located in Santa Anna, San Francisco, and Buffalo,^{/3} and that the entire proceeds of these sales (exclusive of the amounts attributed to inventory) should be paid to Talcott. Talcott thus became the trustee's agent for the distribution of the proceeds of the sale. Talcott, in exchange, agreed "to credit Continental in reduction of its debts, obligations and liabilities to [Talcott] the total amount of funds received by [Talcott] from such sale less all payments" The agreement further provided that the trustees would use the funds received by them from the sale of the routes "first to pay off any and all liens on any specific property sold . . .", and that

the balance of such funds plus any other funds to which the Trustees may become entitled by virtue of the sale of the above-mentioned six routes shall be used as follows: First to retire any Conservator's Certificates presently remaining unpaid together with interest thereon; second to pay to us sufficient funds to enable us to pay off the total indebtedness of \$650,000 created herein; third to pay to us sufficient funds to enable us to pay any unpaid balance

^{/3} The agreement also provided that the trustees would bring on for sale similar routes located in Detroit, Michigan, Indiana and St. Louis, Missouri.

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of your prior advance to us of \$200,000; and fourth the Trustees shall hold any balance of the funds received from the above-mentioned sales in a separate account subject to the determination of the rights of any persons who may have claims thereon.

The Santa Anna, San Francisco, and Buffalo routes were sold to Silco Automatic Vending Co. for the sum of \$2,850,000. Talcott, rather than applying the Silco reserve toward payment of outstanding conservator or trustees' certificates, used the reserve to pay off other debts of Continental, including charges for legal and miscellaneous expenses. When Talcott moved for an order directing payment of the conservator and/or trustees' certificates out of assets held by the trustees, this court found that the August 14th agreement required Talcott to apply the Silco reserve to the payment of the certificates and ordered Talcott to make a detailed accounting and to apply monies to the credit of the debtors in accordance with the court's decision.

The Court of Appeals, characterizing the August 14th agreement as ambiguous, remanded to the district court for further proceedings. This court concludes that the dispute over the interpretation of the August 14th agreement can only be resolved after an evidentiary hearing. Having expressed an opinion concerning the intent of the agreement, I feel that it is necessary to recuse myself. Accordingly, Talcott's

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request for an order directing compliance with the Court of Appeals' decision and determining the "Silco reserve issue" has been assigned to the Honorable Orrin G. Judd under our random selection procedure.

Talcott requests a clarification of the discussion in this court's memorandum of decision dated April 10, 1974 relating to Talcott's objections to the consolidation plan. On August 12, 1974, this court filed a memorandum of decision overruling Talcott's objections to the consolidation plan. Talcott's request for a clarification is, therefore, moot.

Talcott further requests settlement and approval of its accountings for money received which were filed in May and July, 1973. At oral argument of the motion, the court directed the trustees to file objections to the accountings on or before September 27, 1974.

Finally, Talcott requests an order directing the trustees to pay Talcott "at least \$100,000 on account of the certificates . . . " and vacating this court's order of February 28, 1974, requiring the filing of a \$600,000 bond. Talcott's request is based on a remark by trustees' counsel that he believed that the trustees owed Talcott at least \$100,000 on the certificates issued by the conservator. The trustees in response argue that sums in excess of \$1,000,000 have been misapplied by Talcott and, furthermore, that

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Talcott holds \$1,600,000 representing Apco's assets on a claimed lien against Continental. At the hearing, Talcott claimed both a lien (p.53) against and ownership of this money. The court offered Talcott the opportunity to deposit the disputed funds in lieu of the \$600,000 bond, but Talcott declined. The court is not presently in a position to pass on the validity of Talcott's claim for payment of \$100,000 and, in view of Talcott's refusal to turn over monies claimed by the trustees, the motion to eliminate the bond and for an order directing payment of at least \$100,000 on account of outstanding certificates is in all respects denied and it is So Ordered.

TALCOTT'S COUNSEL'S LETTER, MAY 30, 1975,
TO JUDGE JUDD - EXHIBIT A TO SCHWARTZ
AFFIDAVIT (at 198a)

As your Honor is aware, by Order dated September 4, 1974 Chief Judge Mishler referred to you for trial the determination of the "Silco Reserve Issue" in light of the Circuit Court's decision reported at 491 F.2d 313 (2d Cir. 1974). Jacob Hahn, Esq., of Messrs. Hahn, Hessen, Margolis & Ryan, Talcott's counsel in these proceedings, has determined that he is to be a witness for Talcott on the "Silco Reserve Issue". Accordingly, Messrs. Hahn, Hessen, Margolis & Ryan have disqualified themselves and White & Case have been substituted as counsel for Talcott

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for the hearing before your Honor on that issue. The Consent to Substitution was filed with the Court today.

We understand from Mr. Hahn that the hearing has been scheduled for trial for the week of June 16, 1975. We hope that our recent substitution as counsel for Talcott will not interfere with the prompt hearing of this matter and for this purpose we request that your Honor schedule an early pre-trial conference.

We believe that a pre-trial conference would be useful in leading to a formal pre-trial Order with a delimitation of issues, proposed exhibits and witnesses. We would then propose to conduct depositions of the Trustee's witnesses as no depositions have yet been conducted.

We further believe that the pre-trial conference should be concerned with the Trustee's statement that he intends to call Chief Judge Mishler as his witness. The calling of the Chief Judge as a witness by the Trustee presents questions which we think should be discussed and considered. From our understanding of the case, it does not appear to us that Judge Mishler could testify on any matter relevant to your determination, and, hopefully, a pre-trial conference would establish that the Chief Judge's testimony is not necessary or admissible evidence. If, on the other hand, it appears that the Trustee will insist upon calling Chief Judge Mishler, and your Honor determines that the

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testimony would be relevant and admissible, it would then be incumbent upon us to seek the deposition of the Chief Judge. If this turns out to be the case, we would ask your Honor's assistance in arranging the deposition in a manner which would least inconvenience the Chief Judge.

JUDGE MISHLER'S LETTER, JUNE 25, 1975,
TO TRUSTEE'S COUNSEL - EXHIBIT B
TO SCHWARTZ AFFIDAVIT (at 198a-199a)

I reviewed the August 14, 1963 agreement, the application for authorization to sell six vending routes by order to show cause dated August 14, 1963, the order authorizing the sale dated August 16, 1963, transcripts of the court proceedings on August 16, 1963, February 23, 1973, March 21, 1974, and August 23, 1974. It helped refresh my recollection relating to the circumstances that resulted in the execution of the August 14, 1963 agreement. A review of all the proceedings helped resolve some of the confusion in my mind concerning Talcott's claim to the Silco reserve.

I was under the impression that Talcott claimed the Silco reserve on one of two theories - (a) that the August 14, 1963 agreement gave Talcott the right to prefer the payment of its unsecured indebtedness over other unsecured creditors or (2) that Talcott's lien as it existed at the time of the filing of the

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Chapter X petition was expanded to include the Silco reserve. I believe that the first misimpression arises from the failure of Talcott to explain its so-called (or now called) "general lien." No proof was ever submitted to me indicating that it had such a lien at the time of the filing of the petition. The only reference to Talcott liens was to "preexisting liens" and "financing and factoring agreements."

I believe the first time I became aware that Talcott claimed a general lien on all the property of Continental and Apco (subject only to prior specific liens of third parties) was in the conference I had on March 21, 1974 with Messrs. Schlossberg, Hahn and Abeson.

If Talcott had such a lien other interesting problems arise. One of the many problems that appears obvious to me is that the sale of the Santa Ana, San Francisco and Buffalo routes includes good will. Continental had contracts with the various owners or operators of premises at which the machines were located. This was a valuable asset and the sale to Silco included the good will. The Silco reserves represents, in part at least, the sale of the good will. I cannot conceive of a general lien attaching to the good will.

The second misimpression probably arises from repeated reference to an order of this court affirming the trustee's "re-

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statement of collateral." The court realizes that Talcott does not make this claim.

I recall the meeting of August 14, 1963 and the events immediately prior thereto with a varying degree of certainty. I clearly remember my decision to take a vacation with a trip to Puerto Rico a few days before August 14. My vacation lasted one day when I decided to return. I called Mr. Wharton when I arrived at Kennedy Airport and inquired as to how things were going at Continental. I recall him telling me that they could not meet the payroll for Friday and they would have to close the plant. I told him to contact Messrs. Hahn and Golin and have them meet me at chambers the morning of August 14.

I recall the conference with Wharton, Campbell, Golin and Hahn. I do not recall Mr. Kahn being present, although I believe he was. I remember the sense of urgency. The conference lasted some time, possibly 1/2 to 3/4 of an hour. Mr. Hahn indicated that he had a firm offer for the Santa Ana, San Francisco and Buffalo routes (excluding inventory) at a price of \$2,850,000. We talked of the unreliability of Continental's records and the difficulty in determining the identity of the equipment on each route, the extent of liens held by third parties on the equipment. I was advised by the trustee and Messrs. Hahn and Golin that the best way of clearing title to the vending

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machines and equipment and any and all other assets of the three routes was to direct that the purchase price be paid to Talcott and that Talcott would assume the obligations of satisfying and discharging any and all liens from the proceeds, including liens that it held on the property. Hahn neither made a claim nor discussed any Talcott liens except on those specific liens on the equipment on the routes. As far as I knew the trustees were not advised that such liens existed (if, indeed, they did).

Provisions concerning the Detroit, Hammond (Ind.) and St. Louis (Mo.) route sale authorization contained in the agreement did not use the same form of the agreement because there was no offer for either of those routes and the manner of disbursing the proceeds of the anticipated sale of the route though different in form intended to carry out the same procedure for the payment of Continental obligations as in the sale of the Santa Ana, San Francisco and Buffalo routes.

In the discussion in my chambers on August 14, 1963 I was advised that the existing liens on the vending machines and equipment on the Santa Ana, San Francisco and Buffalo routes would probably exceed the purchase price and that there was little likelihood that the trustee would realize any cash from the sale. It was understood, however, that the cash over and above the liens, if any, would go to the trustee. It was further understood in our discussion that because of the immediate demands for resolution

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of the problems that the sale would be brought on as quickly as possible. This meant that there would be little time to secure competing bids and that for all practical purposes we understood the sale would be made to Silco.

My best recollection is that Hahn or Golin advised me that the trustee's total indebtedness to Talcott was approximately \$8,000,000. We all agreed that Talcott's substantial investment in Continental and Apco could be rescued only if the business of manufacturing and selling vending machines continued as a viable business. We also agreed that such continuance was in the best interest of the trustee. The time was short when we recognized that if the loan was not made immediately based upon the immediate sale of the routes, the manufacturing business could not survive.

I have written down what I remember about the August 14, 1963 agreement and the other related documents during the brief recesses I have taken during a trial I am now conducting. I believe that it is sufficient to advise you as to what I am ready to testify to in the proceeding before Judge Judd on Monday, June 30, 1975. I feel it only fair that Talcott's counsel be supplied with a copy of this letter. If before the trial I become aware of any inaccuracy or I recall something further of significance I shall be glad to advise both you and Talcott's lawyer.

I believe that the trustee executed a bill of sale or other documents giving title to Silco. The documents may be of

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significance if the purchase price recites a value for the good will conveyed. Silco's records may also be of significance in determining whether it treated any part of the purchase price as payment for good will.

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- TRANSCRIPT PP. 66-72 EXHIBIT C
TO SCHWARTZ AFFIDAVIT (at 199a)

* * * *

THE COURT: What about the Mishler testimony? As I recall the letter, it dealt not so much with what he communicated but with what he had in mind about good will. That's the first time the suggestion of good will has come into the case. Mr. Schlossberg, do you want to show me that letter? Is that your offer of proof as to what Judge Mishler would show?

MR. SCHLOSSBERG: I did not ask Judge Mishler to write that letter, nor did I suspect that he was going to write that letter before he wrote it.

THE COURT: It just happens as a coincidence that I'm being asked to testify in a criminal matter that is on before Judge Mishler. The device there was for defense counsel to send me a letter with the type of questions that were going to be put so that I could make an offer of proof and see whether they are going to need my testimony. What were you going to prove?

MR. SCHLOSSBERG: Your Honor, very simply, we expect to ask Judge Mishler to relate to us the circumstances of his meeting with the trustees and their counsel and James Talcott and his counsel with him on August 14, as to what statements, representations were made to him concerning the loan; the terms and conditions, the proceeds of sale and so forth, as well as his participation in the August 16 hearing, in which again counsel was present and participated in.

THE COURT: The August 16th hearing is a matter set forth in the minutes. The chamber conferences I guess were not.

MR. SCHLOSSBERG: That's correct, sir.

THE COURT: And Mr. Hartfield, if the trustee's intention is not to inquire about the treatment of good will or the other matters in the letter but simply about what took place in the discussion in chambers; is that inadmissible?

MR. HARTFIELD: I believe the trustee is only going to ask Judge Mishler about what took place in chambers -- to the extent that that letter delineates that --

THE COURT: Somebody give me a copy of the letter. I think Judge Mishler -- and I have not discussed it with him except his telling me he sent a letter to Mr. Schlossberg.

MR. HARTFIELD: Mr. Schlossberg, you told the Court you did not know Judge Mishler was going to write that letter. Mr. Marcheso told me, I'll get an offer of proof that day, and then this came.

MR. SCHLOSSBERG: Mr. Hartfield did not know that the Judge was going to write this letter until after the letter had been written. What Mr. Marcheso knows I can't answer, but I could tell you that I didn't know the letter was written until after it was written.

MR. HARTFIELD: My position is that it should not be, a United States District Judge give testimony with respect to the intention of the parties in a matter that the judge had approved. If that's going to be the law of this nation, your Honor could be expected to testify as to why you approved class actions; as to why you approve other contracts in reorganization and as to what the parties thought about. Every stockholder in the country will inquire --

THE COURT: You are overstating your case.

MR. HARTFIELD: I'm doing that to make a point. I suggest there is nothing in the letter, nothing has been suggested by offer of proof and nothing in the mandate of the Court of Appeals suggested anything Judge Mishler can say can be relevant, to the extent the judge said he misunderstood what went on, that I must say is not a relevancy. It seems to me that is the substance of what Judge Mishler has said, he intends to say.

I urge your Honor that on the basis of what you know about this case, the record so far, that you take this as an offer of proof, the letter which I guess we should mark as an

exhibit and rule the distinguished Chief Judge should not testify in this case because he has nothing relevant to say.

THE COURT: Well, he does in this letter, Mr. Schlossberg, describe what he recalls beginning from about paragraph six down, as having taken place in the conference of August 14. I don't see anything about the August 13 conference.

MR. SCHLOSSBERG: I don't believe there was a conference on August 13. I believe the judge indicated that he returned from a very very brief vacation.

MR. HARTFIELD: There is in evidence that there was an ex parte conference on August 13.

MR. SCHLOSSBERG: I'm curious to see what that evidence is.

THE COURT: I think it may have been Mr. Hahn's testimony.

MR. HARTFIELD: Mr. Hahn wasn't invited.

MR. BARIST: Exhibit 7, the affidavit of Mr. Wharton, and his diary entry, August 13, 1963, meeting with Judge Mishler and Mr. Campbell, at which we reported activities to the former. Mr. Hahn was not invited to that meeting.

THE COURT: I think it is not unusual for a judge to talk ex parte with parties on matters that are not controversial.

MR. SCHLOSSBERG: Not unusual in my experience.

MR. HARTFIELD: We are not suggesting that there was anything improper. We are suggesting that there were conferences prior to this to which Mr. Talcott was not invited. We don't

think that has anything to do with what the intentions of the parties are. That is what the Court of Appeals asked us to try here.

MR. SCHLOSSBERG: If Talcott was not present at any conference I'm sure your Honor would rule that such testimony from Judge Mishler would not be admissible.

THE COURT: I think maybe I ought to take time and look this over and see whether I should treat it as an offer or proof or have Judge Mishler here. He is available from 3:30 to four.

MR. HARTFIELD: I do believe as a matter of public policy and litigants here that you will decide that he not appear.

MR. SCHLOSSBERG: I simply want to make one application. We have a nonjury proceeding. This is a search for the truth. Judge Mishler has not appeared to be at all reluctant to give testimony. I must commend my adversaries for the vigor with which they oppose Judge Mishler's testimony, and that raises in my own mind some very serious questions that I submit to your Honor, that under all the circumstances present here, where we do not have a reluctant witness but rather reluctant adversaries, reluctant counsel, I think the testimony that he can offer will be of great value to your Honor in reaching your ultimate determination as to what was intended by the parties.

THE COURT: Let me consider it between now and two-thirty.

MR. HARTFIELD: I would like to ask the Court to ask Mr. Schlossberg what he just meant when he just said that questions are raised in his mind by my objecting to Judge Mishler's testimony.

THE COURT: I assume your objections may involve some embarrassment, cross-examining a federal judge as well as the legal principle as to how far you go into it?

MR. HARTFIELD: Is that what Mr. Schlossberg meant?

THE COURT: He doesn't have to explain.

* * * *

THE COURT: Continental Vending.

I took a look at Judge Mishler's and the Court of Appeals' statement, and the Court of Appeals said, "We are constrained to remand the case to the District Court for a closer examination of the agreement as a whole, particularly the debts, obligations and liabilities, language and the circumstances surrounding the agreement."

If the portion from the second paragraph on page two on were taken as an offer of proof, I would not at this time rule that it is not part of the circumstances of the agreement that should be considered; and I presume that Mr. Barist would not want to take this as an offer of proof that can be considered without an opportunity to cross-examine Judge Mishler,

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I am not determining what weight to give to it. I may wind up having to say that his interpretation of the agreement is different from what the documents in the file indicate is proper. I have had a difficult task assigned to me for many years and I'll have to undertake that one.

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PP. 99-141, EXHIBIT D TO SCHWARTZ
AFFIDAVIT (at 199a)

DIRECT EXAMINATION

BY MR. SCHLOSSBERG:

Q You are one of the Judges of the Eastern District of New York?

A I am.

Q When were you appointed as a United States District Judge?

A September 26, 1960, that's when I took my oath. I was appointed July 7th of 1960.

Q Did there come a time when there was assigned to you as one of the Judges of this court a matter entitled, In the Matter of Continental Vending Machine Corp., which was assigned number 63-B-663?

A. Yes.

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Q And in connection with that matter, did you appoint co-trustees of Continental Vending Machine Corp.?

A I did.

Q Could you tell us who you appointed?

A John C. Campbell and Irving Wharton.

Q And John Campbell had previously been the conservator of Continental Vending Corp. pursuant to an order of Judge Bonsal issued in April of 1963?

A That's correct.

Q Now, directing your attention to August of 1963, can you tell us please whether or not a meeting had been arranged with the trustees and representatives of Talcott with your Honor, to be held in chambers on August 14, 1963?

A A meeting was arranged.

Q And will you tell us the circumstances leading up to that meeting?

A I had decided to take my vacation a few days before August 14. I left for Puerto Rico, my first visit to Puerto Rico. I remained there one day, decided I didn't like it and came back to New York. When I arrived at Kennedy Airport, I called the trustee, Irving Wharton, and I asked him how things were going with Continental, and he said, Terrible, we are going to close up Friday, we don't have any money to meet the payroll, and I in effect said, You're not closing up, get a hold of the

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Talcott people and ask them to meet me in chambers; the next day, I believe it was, and that's how the meeting of August 14 was arranged.

Q Now, will you tell us, sir, who was present at the meeting in your chambers on August 14?

A Mr. Campbell was there; Mr. Hahn was there, Mr. Golin and now that I think of it, I do believe that Mr. Kahn was there too. I wasn't too sure about Mr. Kahn.

Q Was Mr. Wharton also present?

A Mr. Wharton.

Q And during this meeting, was there a discussion concerning the trustees proposed loan of seven hundred and -- of six hundred and fifty thousand dollars from James Talcott?

A Yes.

Q And was there also a discussion at this meeting concerning the terms under which this loan would be made?

A Yes.

Q And was there also a discussion concerning the manner in which the proceeds --

Was there also a discussion concerning the sale of various routes?

A Yes.

Q And was there a discussion also of the manner in which the proceeds of the sales of these routes would be received

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by whom, and what would be done by them?

A Yes.

Q Now, your Honor, I ask you at this time to the best of your recollection, to tell the Court what you recall took place in your chambers concerning these various points you say were discussed?

A I think that I first spent with Irving Wharton, Mr. Campbell might have been there; our discussion might have been ten or fifteen minutes, and he just recounted the desperate condition that Continental was in, and he indicated that he had some preliminary discussions with Talcott concerning a loan. The meeting expanded when the Talcott people came in; Hahn, Mr. Hahn and Mr. Golin and my best recollection is that Mr. Wharton indicated that Silco was ready to purchase some routes.

The discussion was very comprehensive. First we talked about the extent to which Continental and Apco were indebted to Talcott. Now, I mentioned a figure about eight million in my letter. I could be off, but that could be the total that was due Talcott; Meadowbrook and Franklin, they were the major lenders. Eight million dollars sticks in my mind, the extent to which Continental and Abco were indebted to Talcott. There was agreement that both the trustee and Talcott were interested in keeping Continental afloat. There was agreement that the routes in the various parts of the country couldn't help keep the vending machine

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manufacturing business going; that the expenses, because of the capital indebtedness of the routes were higher than the income by a few hundred dollars. I don't know who led the conversation concerning the offer of Silco, but either Mr. Golin or Mr. Hahn advised me that this was a firm offer, two million eight hundred fifty thousand dollars, San Francisco and Buffalo routes.

We talked about the possibility if the routes were not sold they would be raided. There was a fear that some of Continental's employees might decide to take off part of the route. There were questions as to whether the equipment could be identified. There was talk about the unreliability of Continental's books. There was talk about the amount of the liens on the equipment. Now, the equipment in the main was the vending machines and they included the cigarette machines and soft drink machines, and I believe hot drink machines too. I think there were jukeboxes, but I'm not sure. Talcott, of course, was interested in liquidating some of the indebtedness through the sale, and they would make this loan of six hundred fifty thousand dollars only if some of that indebtedness was paid. When we talked about liens, the only liens we discussed with Continental, bills of sale and mortgages, no other liens were ever mentioned. I relied on Hahn and Golin for the information concerning the condition of the routes and the extent of the indebtedness. And we decided that since

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Talcott knew more about the condition of the liens than anyone else, and since Talcott was a very substantial creditor, having liens on the equipment, on those rights, and having the facility to investigate and the means to pay off when necessary, pay the liens off, discharge them, that the proceeds of the sale would come to Talcott and they would in fact act as a disbursing agent for Continental. I'm not certain of this, but as I recall it, many of these routes originally was in wholly-owned subsidiary corporations and later merged with Continental. I don't know whether the original books of the subsidiary corporations were ever located, but that was part of the confusion.

I was advised, and I believe that Talcott's records were more reliable than Continental's.

Now, we were talking about Friday's payroll, I think this was Wednesday the 14th, and we needed money by Friday so the discussion was that if the authorizations were given by Friday, Talcott would make an advance on the six hundred fifty thousand dollar loan to meet the payroll. We talked about a show that would display Continental Vending machines. Continental had invested a lot of money in developing a hot and cold drink vending machine. I think they invested a few million dollars. We felt it would all go down the drain if they didn't display it. It was very important to keep Continental going. Now, no one knew at that meeting how much the liens were, the conditionals and the chattels were. Hahn and

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Golin, I think, expressed an opinion, or someone did, and I say it's either Hahn or Golin, they were the only ones who were there who would have an opinion -- were far in excess of the six hundred fifty thousand dollars for the purchase price, but since we didn't know, we discussed the possibility that there might be some funds in the purchase price over and above the amount of the conditionals and the chattal mortgage. So we said, any money offered would come to the trustee. Of course, we were interested in getting some cash flow, and that's why we agreed that, at least, the inventories in the machines which were very substantial, that would give you some idea about the extensiveness of the rights -- ultimately came to four hundred thousand dollars. That money was to come to Continental, the hope being it would be used in the business of manufacturing of any machines.

Now, Silco, of course, was the only purchaser, prospective purchaser on the horizon and with an offer of two million eight hundred and fifty thousand dollars we realized that that was the selling price. We couldn't hope to get another purchaser to make the deal immediately at that price. Now, we also discussed the sale of the other routes in various parts of the country; Hammond, Indiana; St. Louis, Missouri and Detroit, Michigan. We had no buyer for that, but the understanding was that the authorization would be given and the hope and expectations were that a purchaser would be found; again, to release

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Continental and Abco from its indebtedness in the hopes that the manufacturing business would survive. Now, that discussion took a half hour or three-quarters of an hour -- and I had forgotten, I think I read something in Mr. Hahn's testimony where he said he and Golin and Kahn and Campbell went into my law clerk's offices and drew an agreement. I think they discussed it. They might have written something out, but it was Mr. Hahn that I say used the phraseology and the language in that agreement.

Q And does this generally exhaust your recollection of what took place?

A Yes. I have an idea they left my chambers and came back with no other show cause that I signed. That recollection is very hazy. I don't think it was typed up in my office, but it could have been.

Q Now, during this August 14 meeting in your chambers, did Mr. Hahn ever say, in words or substance, that Talcott has a general lien in addition to the specific conditional sales contract of chattel mortgages?

MR. HARTFIELD: Objecting, leading.

THE COURT: I'll permit it.

A He did not.

Q Did Mr. Hahn ever say, in words or substance, during this meeting, that after all of Talcott's liens of any kind were satisfied on these three routes, and if the purchase price exceeded

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the amount needed to satisfy all of those liens, that any surplus would be returned to the trustee?

A He did not.

Q Now, pursuant to the order to show cause which your Honor signed on August 14, which has been marked Exhibit 1 in this proceeding, a hearing was held before your Honor on August 16, and during the course of the hearing at which James Talcott was represented -- Page 11 -- your Honor asked, August 16 --

"How about the adjustment on the sale of the California route? I understand that there has been some understanding that it hasn't been incorporated in the written agreement."

To which Mr. Kahn responded:

"Your Honor, the written agreement provides that the money raised from the sale of the two California and one Buffalo route will be made to Talcott to satisfy the liens which they have, which are in excess of the purchase price. After those liens are satisfied, Talcott then, if there are any proceeds available beyond that distribution, they will return those proceeds to us."

What did you understand Mr. Kahn's statement on August 16 in referring to Talcott saying it's --

MR. HARTFIELD: Objection.

THE COURT: It's the same question I had before as to the effect, if any, of a participant, or the Judge's private understanding of the meeting, and I have doubt as to what effect

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that is, but in going into all of the circumstances, I'll listen to it and then determine what weight to give to it.

Q Did your understanding comport with your understanding of the discussion which was held in your chambers on August 14th with respect to Talcott satisfying the liens on specific Continental contracts and chattel mortgages?

A My understanding is that the reference to Talcott's liens being in excess of the purchase price referred to the specific liens that was the probability no one really knew.

Q Now, if the trustee had requested authority to sell these routes and to permit Talcott to keep all of the proceeds to satisfy not only specific liens but its general liens as well --

MR. HARTFIELD: Your Honor, I would like to object to that, and I would like to call your Honor's attention to the case of Fayerweather against Rich, Supreme Court of the United States. I would like to quote this line:

"Nevertheless, no testimony should be received except open, intangible fact matters susceptible of evidence on both sides. Judgment --

THE COURT: I am not going to let you ask Judge Mishler what he would have done if something different was presented to him, so the objection is sustained.

MR. SCHLOSSBERG: I have no further questions.

THE COURT: All right, Mr. Hartfield, do you want

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to cross-examine.

CROSS-EXAMINATION:

BY MR. HARTFIELD:

Q Judge Mishler, you disqualified yourself in this case, did you not, sir?

A Yes.

Q Why did you do that?

A I had a definite opinion as to the position of Talcott in this case. I thought it was baseless.

Q When did you form that opinion?

A I formed it over the years.

Q Why didn't you disqualify yourself when Talcott made the application which was reversed by the Second Circuit?

A Just with reference to this matter. I always had this opinion and since that's the question that was remanded I couldn't very well sit on it. I said in my District Court opinion, that the language is unambiguous. When I looked at it it was unambiguous to me, but I suppose Judge Mansfield felt differently. It was never a question in my mind.

Q Now, you wrote a letter to Schlossberg and sent a copy to me, did you not, last week?

A Yes, sir.

MR. HARTFIELD: I would like to offer that in evidence and we'll call that -- I don't know what number is it?

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THE COURT: I thought it was marked for identification. You want to offer the whole thing in evidence? I presume there is no objection, Mr. Schlossberg?

MR. SCHLOSSBERG: I don't really see the relevance. Judge Mishler is here. He has testified. He's submitting himself to cross-examination. Although I must confess, with all due deference, I don't know why the letter was written in the first place.

THE COURT: There may have been a hope that it would take the place of testimony.

MR. SCHLOSSBERG: But since he is here and testifying, I'm not sure on what basis --

THE COURT: Mr. Hartfield, what is your view?

MR. HARTFIELD: I would like to cross-examine the Judge from this document, and I would like it in evidence. If it is not to get in evidence.

THE COURT: I'll receive it as a statement that the Judge used. I don't know whether it will be received as evidence or as a supplement to his earlier opinion. There were parts on the first page that I felt was legal rather than factual.

What is the number?

THE CLERK: Talcott Exhibit 26.

BY MR. HARTFIELD:

Q You say in paragraph one you reviewed a number of things. You do not say that you have reviewed the opinion of the

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Second Circuit. Was that an omission?

A It was not. I looked for it and couldn't find it. I asked my law clerk to find the slip opinion. It hasn't been reported yet, apparently.

THE COURT: It's been in 491.

Q Now, look at your short third paragraph, please, sir, you say that you believe that the first time you became aware that Talcott made a general lien was on March 21, 1974; is that right, sir?

A Yes.

Q Hadn't you read that opinion of the Court of Appeals of January 1974 before that?

A I don't believe that it's clear, because the general lien that Talcott claims has not yet been defined to me, to this very moment. I don't know what they mean.

Q I think you say in your letter that you for the first time became aware that Talcott claimed a general lien?

A That's right.

Q Didn't you get that from reading the opinion?

A Well, I don't know that the opinion says general lien. I think Judge Mansfield spoke about a prior existing lien that was confusing. Prior existing liens meant the conditional and chattel mortgage.

Q Isn't it a fact that Talcott's answer asserted the

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matters that are referred to in that paragraph three of your letter, and that answer was filed in this court, and your Honor read it prior to making determination that it was reversed?

A If it described Talcott's position in those terms, to wit, general lien, then I overlooked it. It was never called to my attention, and I was never aware of the nature of what they claim.

Q You note in the second paragraph of your letter that you say that you rendered two impressions. Later on the next page you talk about a second mis-impression. Is it fair to say that you were saying that you were under mis-impressions when you signed the order?

A Oh, no. I said that these impressions that I got were mis-impressions and I tried to explain how I came to have those mis-impressions.

Q You did you say have those mis-impressions at the time you signed the order?

A Yes.

Q And is it your view that's what you think is determinative rather than what the parties think?

A Oh, no. You see, what the parties think that I was a party to the conversation --

Q You are a party.

A I say I was a party to the conversation, I'm not a

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litigant. Would you allow me an explanation? This was dictated paragraph for paragraph. I never re-dictated it. I felt it was important to give you my views and give them to Mr. Schlossberg, but that's why it's disjointed.

Q Did you do this entirely by yourself or did you have help?

A Myself.

Q Mr. Marcheso did not --

A Mr. Schlossberg came in to deliver these various documents that I recited. I put them in the file, he explained to me what they were. I said, I'll look at them. I took them home, I read them at home and as the breaks came during a trial I just gave my views. They are almost reactions rather than well thought out ideas.

Q You did tell Mr. Marcheso that you were going to send that letter?

A No. As a matter of fact I called Mr. Schlossberg -- Mr. Marcheso never appeared. Mr. Schlossberg came in, and I didn't think of this until after I read the document, and then I called Mr. Schlossberg after I wrote the letter and I said, this is the letter; I'm sending it to you and I'm sending it to counsel for the claimant.

Q When was that?

A Well, he came to see me the day before June 24 at the

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end of the day, about a quarter of five, when I got through with my trial day.

A If you will look at the first little paragraph on page 2 concerning your second mis-apprehension or mis-impression, I'm sorry, the last sentence says:

"The Court" -- and that's you -- "I suppose counsel realizes that Talcott does not make this claim."

Where did you get that information?

A I thought that on its face - it was wrong because what I tried to say, one of the impressions I got from listening to Talcott's discussion about the statement of the security or re-statement of the collateral -- I forget which it was called -- I believe sometime in November or December of 1963, it might have been later, during argument or during discussions concerning the rights to the Silco reserve, they talked about restatement; so it occurred to me when I wrote the letter that that probably was one of the theories that Mr. Hahn was advancing, and then I felt that that must be a mis-impression because what he's saying and flying in the face of Judge Mansfield's opinion, I thought, was that a restatement of collateral somehow expanded his lien that existed at the time of the filing of the petition. I said, obviously, that's not their claim.

Q The basis of your statement in the letter, "That the Court realizes that Talcott does not make this claim," was a

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guess on your part?

A I think so. I can't believe that they are making it today in the face of what was said in that opinion, and what is basic law.

Q We certainly do make it, your Honor.

A Good luck to you. You don't make it in those words, you make it as a statement of what was a subsequent document that you claim interprets the agreement, not as a creation of a new lien.

Q Absolutely. Prior existing lien.

A That's not what I'm saying. I'm saying if the claim is -- I interpreted Talcott's claim as expanding a pre-existing lien by something that was stated, a declaration, and that can't be.

Q Tell me about the expansion. What do you think was expanded and when?

A It was a lot of loose talk during argument on the Silco reserve. I said these impressions didn't arrive from a specific document or statement, but on any number of occasions when we talked about the Silco reserve, these agreements were called to my attention again and again, and it occurred to me when I wrote this letter -- Well, I suppose that's what I thought the basis of their claim was, but it couldn't be -- I'm arguing with myself -- it couldn't be because they certainly wouldn't

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make a claim of expanding a pre-existing lien by some document or declaration that was made subsequent to the filing of the petition.

Q Now, Judge, will you tell me what way you think Talcott has attempted to expand its lien?

A I don't think they attempted to expand it. I say I had the impression that they had a theory that when, after the next loan, which I think was a \$750,000 loan, they asked for some documents, and I think it was called re-statement of collateral; statement of collateral and it listed the liens that Talcott had, had at the time of filing the petition; and it occurred to me that Talcott might be claiming that that declaration or that restatement confirmed by the Court, as I recall it, expanded a lien, and when I tried to say -- second mis-impression -- couldn't be because I had no authority to expand any lien. That's where I talked about the prejudice to other creditors or lienors.

Q Maybe I have not understood you. Is it your testimony that Talcott has attempted to expand any liens?

A I can't answer that because I got the impression that these were theories that they were advancing. They never made a specific claim as to how they were entitled to the so-called reserves. I don't know today, as I say, the theory.

Q Was this your first Chapter 10 proceeding?

A Yes.

Q Have you had any since?

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A No. I never heard of a conservator who was appointed in Southern District. I might say that's why I made the inquiry how these certificates were to be paid. We had that discussion at that time in chambers.

Q Now, did there come a time when the \$750,000 loan was made by Talcott, when a general release was guaranteed by the trustee to Talcott?

A That's right.

Q Did you sign that general release?

A I authorized the trustee to execute it.

Q Did you sign it?

A No, I don't believe I signed the release. I signed an order authorizing a trustee to execute a general release.

Q Exhibit 3-E?

A That isn't my signature. This is John Campbell.

MR. BARIST: May I see the exhibit for a moment?
Referring to Campbell's signature where it says LS and Wharton's signature, it says LS, which is dated January 14, 1964, and underneath that signed and sealed and presence legible, so ordered, dated February 10, 1964. That's a bad copy of Judge Mishler's signature.

THE WITNESS: I assume I so ordered it.

Q But at the time that you so ordered that release --
Have you so ordered any other releases since then or

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before then?

A In this proceeding?

Q In any proceeding.

A I can't recall any at the moment. I don't know in any other capacity except as an overseer in a Chapter 10 proceeding.

Q When you so ordered that release, did you read it?

A I believe so.

Q At the time of so ordering that release, you knew, did you not, that Talcott was holding the funds that had been received for the sale of Silco?

A Yes.

Q And the release is general in form except it makes two exceptions; is that correct?

A I can't recall what happened this morning. I read it now.

Q The two exceptions do not relate to the Silco reserve, does it?

A It certainly does.

Q Where?

A Exception No. 1, "To satisfy any prior liens on any equipment included in the sale of the route."

Q The only thing that was accepted was the obligation of Talcott to pay off the lien of third parties from the Silco

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reserve.

MR. SCHLOSSBERG: I'll object to that.

THE COURT: It's in evidence. I'll sustain the objection. This is again an interpretation of a written document.

THE WITNESS: I didn't realize that this too may support the trustee's position here. I never thought of that, but you pointed it out to me. If Talcott was supposed to take all of the money then we wouldn't talk about it --

MR. HARTFIELD: May I assume, your Honor, that the witness extension of his remarks -- let me inquire of the area in which I was going?

THE COURT: Yes.

Q Now, will you look at the exception you referred to, 3-A, and tell me, is it a fact that the only exception that has anything to do with the Silco reserve, only relates to the obligation of Talcott to satisfy and discharge the liens of Talcott and the liens of others?

A That's right. I haven't looked at the other exceptions and its pages, but I would say it appears that way.

Q In other words, it appears that the only exception is the satisfaction of prior liens; is that correct, nothing to do with the proceeds, two million odd dollars that were received?

A Doesn't say it expressly. But it would, and by its terms the only thing except from the release --

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THE COURT: You are getting repetitious on that matter of legal interpretation, Mr. Hartfield.

Q Now, you have spoken about in your letter, about good will?

A Yes.

Q What do you understand to be the meaning of good will in a corporate sense?

A I believe in every going business there is an item of good will, it includes customer list, rights under contract, the name. It's all good will. This wasn't a sale of so many vending machines, so many jukeboxes. This was a going business.

Q Isn't it a fact that Mr. Wharton told you that the routes were underwater and that the debt service required to service them exceeded the cash flow that could be obtained from them?

A That's right.

Q Did you ever hear of a situation where there is a negative cash flow, where there is good will?

A You bet.

Q Give me some examples.

A Thousands.

Q Give me a few.

A Do you think Pan American that loses 200 million dollars a year or \$500 million or 800 million dollars a year doesn't have any good will because their balance sheet shows a loss? Do

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you think that any corporation that has lost money for any fiscal or calendear year has no good will?

Q I'm just asking a question about instances that you know of where there is good will in a corporation which is losing money, and you have given me an example.

A Would you like to buy General Motors for no dollars? They lost a lot of money.

THE COURT: I think I ought to agree with Judge Mishler as a question of fact, there can be good will with a negative cash flow.

Q Can there be good will with a non-profitable enterprise?

A It depends upon what circumstances.

THE COURT: Mr. Hartfield, I think you are on an unprofitable line here. These routes were being sold free and clear.

MR. HARTFIELD: I'll get off in two minutes. Two more questions and you'll see where I'm going.

Isn't it a fact that the good will, if it exists in routes, such as California routes, consists on the location and the machines on the location?

THE WITNESS: I have no expertise in that area. I couldn't say, but I would guess that's what it is.

Q In fact, your last paragraph on your first page of

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your letter indicates that that was your thought. You say, "the sale of Santa Anna, San Francisco, Buffalo route shows good will, had contracts with various owners of premises at which the machines were located."

A It was a random thought I had; and I said how could the general lien attach the entire proceeds. We were selling a business. We were auctioning off a business. I never heard of a general lien attaching to good will, maybe it does. I never heard of it.

Q Did you know, or did you think when you wrote this letter of the fact that the location contract had been assigned to Talcott Security as early as 1960, '61 and '63?

A I may have known it, but I don't at this time. I have no recollection of that.

Q If you knew that to be the fact, that would militate against any force in the good will argument?

A No, I think it would just indicate the good will just wasn't worth as much as it should have been, it's still there. Mind you, if Talcott took that as security, it must have thought it was worth something; so the net value of the good will is less, but I don't even know whether these routes were under any trade name. Usually the trade name in the business is worth something, if it has any value in the trade. That's only one of the elements of good will, customer's list.

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Q Now, while you say you haven't read the Court of Appeals opinion recently, I would like to read to you from it.

THE COURT: Look at it.

A Judge Judd has given me a copy of it.

Q Look at page 15, right-hand side, the paragraph beginning, "thus and all times," and in the middle of it -- "in addition, Talcott is the financier of many Continental routes held" -- and I'm skipping -- "assignment of route location contracts."

So that it's quite clear from the Court of Appeals opinion and the record in this case, that whatever good will exists in location contracts was assigned to Talcott as security --

MR. SCHLOSSBERG: Objection.

THE COURT: Sustained. The witness has made a distinction between location contracts and good will, and you are on legal argument there.

MR. HARTFIELD: I hadn't realized.

THE COURT: He said if they had the location contracts it would diminish the good will, but there might be some in trade names and other things.

Q Do you know, sir, of any authority that good will can be sold in gross and is not subject to liens?

A I don't understand the question, I'm sorry.

THE COURT: Can you sell good will, apart from the

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business?

THE WITNESS: No.

Q Can you sell it apart from the location contract?

A I don't think so.

Q Location contracts were pledged?

A I think it's theoretically possible. I don't think it applies here. When we sold the manufacturing business -- I don't think the physical equipment was worth more than a hundred thousand dollars, we got four million dollars for that, possibility of getting six million.

Q The earlier part of your testimony you said you relied on Mr. Kahn and the late Mr. Golin with respect to some things in the conference of August 14, 1963; is that correct?

A Yes.

Q And did you rely on Mr. Kahn and Mr. Golin to tell you what Talcott's lead position was?

A More or less; yes.

Q Wouldn't you ordinarily rely on the trustee to tell you that?

A In this case the trustee had no way of knowing the financial condition of the debtor; Talcott knew about it. Talcott's accountants were in there periodically, and Talcott had investigators identifying equipment, trying to locate equipment. Some equipment was stolen; some equipment was substituted.

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Q Did you tell Mr. Hahn or Golin that you were relying on him for a statement on the collateral?

A I don't know. I'm a little hazy what the statement consisted of. That came much later in the proceeding and that was between he and the trustee. I renewed the document but I had no part in drawing it, or the terms of that second loan, \$750,000 loan.

Q When you talk about specific liens, are you referring to liens on location contracts?

A No, that's specific collateral, it's listed.

Q What is the difference between that and a general lien?

A You have to tell me. I can't see how Talcott could have fulfilled it with the filing requirements of any state by just some contract.

THE COURT: Were you ever told that Talcott had filed a security instrument affecting all the equipment in every county in every 50 states?

THE WITNESS: I don't remember that.

THE COURT: That was the testimony here.

THE WITNESS: That would be interesting. I would like to see the security agreement. Is that conceded? It would be interesting if it were filed.

THE COURT: How much longer do you expect to be, Mr. Hartfield?

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MR. HARTFIELD: Some time.

THE WITNESS: I can take it all night if you can.
I would like to complete it. I am in the middle of a trial.

THE COURT: I am imposing on Mr. Le Gendre.

MR. HARTFIELD: I'm sorry.

THE WITNESS: It's a document that I would have to
read at my leisure.

Q I call your attention to the last paragraph on page
2 of your letter in which you say -- and I paraphrase -- if I do
it unfairly, please stop me.

A Yes.

Q That provisions for the sale of the other routes in
the August agreement did not use the same form of the agreement
because there was no offer for these routes, and the manner of
disbursing the proceeds though different in form intended to carry
out the same procedure. Why was it different in form than the
paragraph just above if it was intended to carry out the --

A I'm glad you understood the paragraph. It sounds a
little garbled but I thought I got the idea across. I had nothing
to do with drawing the agreement, as you know, but what I tried to
say in this paragraph is that the abrogation of the proceeds of
the San Francisco-Buffalo routes, which ultimately were sold to
Silco. I feel that Mr. Kahn drew it and so I feel that his first
concern was to provide for all the money coming to Talcott out

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of the Silco house, because he was the disbursing agent there.

Q Let me interrupt you. You say you feel that Mr. Kahn drew it. Do you know he drew it?

A The discussions lead me to believe that. I didn't see him do it.

Q Mr. Hahn had testified that he drew it.

A I believe that he had little --

Q Mr. Kahn has testified that he drew it.

A William Kahn.

MR. SCHLOSSBERG: That's not true.

THE COURT: He hadn't testified before me.

THE WITNESS: William Kahn.

Q Well, the truth of the matter is, sir, you don't know who drew it?

A I have no personal knowledge.

Q Now, will you continue.

A I practically finished what I was about to say. Mr. Hahn, I felt it was his authorship and his form, and I can understand why the language is different. He had a buyer he knew -- two million eight hundred dollars -- he knew he was going to receive all the monies. Now, we didn't know who the purchasers for the other house was going to be. By that time we thought the trustee would be handling it. We wanted to make certain it would be applied in the same manner as the Silco deal.

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Q Now, please look, sir, at the agreement that I have caused to be put on the table there and the paragraph beginning, "the total funds."

A I have it in a different form but I have the agreement.

Q You see the sentence I'm reading from?

A That doesn't say less payment to third parties. I don't think it means third parties. I think the next sentence explains it. "You agree to satisfy and/or discharge any existing any enforcing vendors or lenders, liens or encumbrances," and I think that was a substitute for the word chattel mortgage and conditional chattel mortgages -- "any of the assets to be purchased hereunder" -- and I think that's the important phrase.

Q Let's see if I understand this.

A It includes Talcott's lien that it had --

Q Or affecting any of the assets to be purchased thereunder.

I agree with that. Let me read that and stop me if I'm wrong. That sentence means that the total funds, total funds received from the sale of what is now known as the Silco routes, Talcott shall receive and they, Talcott, agrees to credit Continental, debts, obligations to Continental, the total amount of the funds received, less these other payments that we have just discussed; isn't that correct?

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A That's right.

Q Now, what were these debts, obligations and liabilities, other than the specific liens that you have just referred to of Talcott and other vendors?

A Only the specific liens. Otherwise the last sentence in that paragraph is meaningless. "You further agree that after you have given such credit and performed your obligation as completely set forth above, that the surplus, any remaining in your hands shall be turned over to the trustee.

Q What is meaningless about that?

A Because I was under the impression that Talcott was a credit to the extent of ten million dollars. I say I can't give you the basis of that. I think that's what I was told, the purchase price was two million eight hundred fifty thousand dollars.

Q I think your memory will be jogged. The larger figure you are speaking about had to do with both Abco and Continental.

A Yes.

Q Right here I'm talking about something else, just Continental?

A Well, I'm not sure. On August 14 I realized this was loose conversation. We talked about how much was owed, and I heard eight million dollars, and I didn't ask for it to be broken

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down. We were talking about Continental, a petition had been filed only against Continental at that time, and when the entire purchase price of two million eight hundred fifty thousand dollars was to be applied to the debt, the reduction of the debt. I feel that's what it meant.

Q You feel, you don't know?

A Oh no. I'm really bordering on the border of speculating, it wouldn't be fair. This was partly general conversation, learning about the financial condition of Continental. I was new to all this.

Q The debt obligation and liabilities referred to in that paragraph, in the main, refer to pre-April 8th obligations, do they not?

A Pre-April 8th?

Q That was the date.

A Oh. All I can say, it doesn't say general liens. I'm puzzled by the phrase. It's not my language.

Q Now, I read to you from the transcript of the 16th, Page 47 -- Mr. Kahn, counsel for the trustee:

"What we are doing is bringing up the inventory in that room which is less than a hundred thousand to the trustees to enable them to continue their manufacturing operation. That's what we are doing."

Now, we also hear this:

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"Well, if you were selling off all these routes and you are getting all that money, why don't you use some of the money to pay other secure creditors?"

And the answer is:

"Because there isn't any free money after the sale of the routes. When these routes are sold, these routes are so heavily pledged, all prior to April 8th, nothing since April 8th, but nothing since April 8th. These routes are so heavily pledged that we get nothing out of them from the inventory and that inventory would be barely enough to get our manufacturing through the end of September."

Now, doesn't that make clear to you now that the debt obligation and liabilities of Continental referred to in that paragraph were all the things that were existing on a prior date under pre-existing contracts?

A I'm not convinced it's talking about anything but the specific secured obligations; certainly not unsecured debts and obligations.

Q Do you know of any unsecured debts and obligations?

A You mean that Talcott had?

Q Yes.

A Well, until I'm convinced what the general lien is, I don't know that Talcott is a secured creditor.

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Q You never heard of a general lien?

A My recollection, and it goes all the way back, we don't touch on this too frequently, is that when you get what I think Talcott called a general lien, it's an agreement to lien. We used to hear of second mortgages on chattals. You know there is no such thing, so you call it an agreement to lien. I haven't examined these documents. I don't think I should express an opinion; and one of the questions I had, if I'm permitted to ask it, was whether the so-called general lien satisfied the following requirements or something was submitted to me and, I assume, the so-called general lien was filed. I don't know if it satisfies the lien lawsuit in New York or California.

Q I think your Honor has testified in none of the meetings you had with Mr. Campbell, Mr. Kahn, Mr. Wharton or Mr. Hahn, nobody used the term general lien?

A I don't recall it.

Q The first time it was used in the Circuit Court's opinion which said that Talcott had a general lien?

A Will you point that out to me?

MR. BARIST: Page 821.

Q The term may have been used any number of times.

MR. SCHLOSSBERG: I'll object.

THE COURT: There is a question as to the witness' recollection.

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THE WITNESS: My awareness of it, I don't recall until we had the conference, and that was March 21, 1974; even this general lien isn't as general as Talcott claims. This is general lien against the route. What does that mean?

Q Doesn't the Court of Appeals say Talcott has a general lien?

THE COURT: Let's not ask the witness what the Court of Appeals said. I'm sure Judge Mishler can read Judge Mansfield's opinion. I don't think you should take time to have Judge Mishler say what Judge Mansfield said.

MR. HARTFIELD: Yes, sir.

Q Is it your view, Judge Mishler, that the only way a creditor may obtain a lien, general or specific, is to file papers against a specific piece of paper?

A I didn't say that.

Q How else may be obtain it?

A Well, there was one indication how to get a lien on rights to the contract by assignment, that's a way. I don't know how you get a general lien. All the assets of an individual, without specifying what the assets are, what the lien covers.

Q But you don't know that you cannot?

A The question implies that you can, and I'm not ready to challenge you, Mr. Hartfield; if you are on the fourth floor, I'd say submit a memorandum on it.

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Q I'll go back to something I didn't finish, I skipped around. You say you thought that Mr. Hahn and Mr. Golin knew more about the lien than the lawyers, nonetheless, I assume, you knew the trustee made an investigation of what the liens were?

A At that time; no.

Q You didn't ask them whether they had?

A I gleaned from what they didn't know that they didn't know. We are talking about thousands upon thousands upon thousands of equipment throughout the country.

Q I'm not talking about exact amounts, I'm talking about the existence of liens, not the amount.

A The trustees had no investigators. It had books of accounts which were unreliable; it had an accounting staff that consisted of just a few at the time of the filing of the petition. Talcott was the one who knew about Continental's business and not the trustees.

Q How was Mr. Wharton able to tell you on the 16th of August in open court in support of this agreement that he, as counsel, and presumably the trustee, knew that there were liens on the routes and accepted it in excess of anything that could be released?

A I think you'll have to ask -- I could guess that he got the information from Mr. Hahn and Mr. Golin.

Q You can only guess that, you don't know?

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A I don't know.

Q Mr. Campbell has testified this morning he knew about pre-financing agreements, and he knew about the consolidation of mortgage prior to that time. Does that change your view?

A No, that's meaningless, pre-financing agreements. If Talcott made a loan on ten vending machines before the filing of the petition, that was a pre-financing agreement; that didn't indicate to me in any way that Talcott had a general lien; so pre-existing financing agreements, factoring agreements, were meaningless to me.

Q It didn't indicate to you that there was some sort of a secured interest that Talcott had?

A It certainly did in specific items of equipment.

Q Did you know whether the specific items of equipment were security for more than the advance?

A I never inquired into that.

Q Did you ask the trustee?

A I don't recall asking the trustee.

Q You never asked the trustee whether he made an investigation as he was required to do under the law of the security of the estate?

A We are talking about August 14. We are talking about one month after the filing of the petition. We are talking

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about obligations throughout the country that totaled some twenty million dollars.

Q You have known Mr. Wharton for a long time?

A Yes.

Q You knew him before you went on the bench?

A Yes.

Q Mr. Wharton is a close friend of yours?

A Yes.

Q Now, when Mr. Wharton told you that the liens on these routes exceeded anything that could be obtained for them, did you just assume Mr. Wharton was relying on somebody else or he made his own investigation?

A I assumed nothing. I made no determination at the time.

Q Judge, you testified a few moments ago that you had read Mr. Hahn's transcript of his examination before trial?

A Something he said, something he said someplace, maybe in the deposition. When he said he came to my chambers on August 14 and went into my chambers. I hadn't remembered that, but I thought about it.

THE COURT: Was it a transcript of testimony or was it a transcript of argument?

THE WITNESS: I can't remember.

THE COURT: Mr. Schlossberg gave him some transcripts

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of --

MR. SCHLOSSBERG: I spoke to Mr. Hartfield. I did not furnish Judge Mishler with transcripts of any of these proceedings or his deposition. I think Judge Mishler is referring to the fact that -- if your Honor may recall, there was marked in evidence in these proceedings a memorandum to the file that Mr. Hahn made on August 15.

THE COURT: But that didn't go to Judge Mishler.

MR. SCHLOSSBERG: That memorandum was marked as an exhibit in hearings before Magistrate Catoggio in respect to a proceeding involving a claim for reimbursement of legal fees for James Talcott. It was marked as an exhibit in those proceedings, and those proceedings were forwarded to Judge Mishler with the master's report, and I would suspect Judge Mishler is referring to that document which was marked both in those proceedings and in these proceedings.

I will represent to the Court and Mr. Hartfield I did not furnish Judge Mishler with Mr. Hahn's testimony.

BY MR. HARTFIELD:

Q Getting back, if we may for a moment, to general liens, and I would appreciate it if you would look at Page 820 of the Court of Appeals' opinion, and look at the bottom right-hand side of the page, essentially the trustee is saying, prior to August 14, Santa Ana, San Francisco and Buffalo routes were the

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property of the trustee and Talcott had no proceeds of their sale beyond the extent of its vendor or purchase money lenders lien.

Now, that, I think, is what you understand; am I correct? You stop me. Then any of Continental's other creditors except conservators -- this argument ignores the pre-1963 financing agreement which gave Talcott the right to hold all property of Continental in which Talcott might have obtained a security interest as security for any and all obligations of Continental, at any time owing to talcott.

Now, this is what the Court of Appeals means by a general lien and what we are talking about.

Now, have you ever heard of that type of lien before?

A I've never come across it.

* * * *

JUDGE JUDD'S DECISION, JANUARY 28, 1976

This court has received evidence and considered briefs on the issue of the "Silco Reserve", which was assigned to this judge by random selection after Chief Judge Mishler recused himself from deciding the motion of James Talcott, Inc. (Talcott) to determine that issue. The Silco Reserve issue had been remanded to the district court by the Court of Appeals, 491 F.2d 813 (1974). Talcott was the factor which supplied financing to the debtor Continental

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Vending Machine Corp. (Continental) and its subsidiary Continental Apco, Inc. (Apco) both before and after the reorganization proceedings began.

Introductory

An unfortunate choice of nomenclature has obscured the real issue with relation to the Silco Reserve. Even Talcott referred to its claim as based on a "general lien", a term which suggests some device outside the Uniform Commercial Code for preferring an unsecured claim. The real issue, as it developed during the presentation of the case, was the amount of indebtedness secured by particular liens. Or, put another way, the question is not what particular property and assets were pledged to Talcott, but what debts that property secured.

Talcott's claim was really that all its indebtedness was secured by each lien on any specific piece of pledged property. If the case is considered from the point of view of the amount of secured indebtedness, or the right to "cross-collateral," which the Court of Appeals mentioned (491 F.2d at 815), instead of on the basis of a "general lien," the various pieces of evidence fit logically into place.

There were so many exhibits and documents and such an amount of testimony that a somewhat extended analysis of the facts is required.

Facts

There were two main divisions of Continental's vending

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machine business. One was the manufacture of machines and the other was operation of routes. Each route comprised hundreds of machines, including mainly juke boxes and cigarette vending machines, situated in locations whose owners had agreed to provide space for the operation of the machines. Continental had six principal routes, which in turn fell into two categories. On three of the routes, Santa Ana, San Francisco and Buffalo, Talcott had liens on every machine and every location contract, although some machines were subject to superior prior liens of other vendors or lenders who could not be accurately identified because of the peculiarities of recording statutes in California and the inadequacies of Continental's record-keeping. The other three routes, Detroit, Michigan, Hammond, Indiana and St. Louis, Missouri, were subject to Talcott liens on some of the machines, but not as extensively as the other three.

Talcott's claim stems from two pre-conservatorship financing agreements, one with Continental dated May 11, 1960 and the other with Apco dated April 1, 1961. Each agreement designated Talcott as the company's sole factor for accounts receivable, and stated

"[Talcott] shall be entitled to hold all sums and all property of the undersigned, at any time to its credit or in your possession or upon or in which you may have a lien or security interest, as security for any and all obligations of the undersigned at any time owing to you and/or to any company which may now or hereafter be your subsidiary, no matter how or when arising and whether under this or any agreement or otherwise, and including all obligations

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for purchases made by the undersigned from any other concern factored by you or such subsidiary."

In the fall of 1962, when Continental's indebtedness had run above \$4 million, Talcott undertook an audit of all the machines on every route in which it had a security interest. A "Consolidation of Debt and Restatement of Collateral" was executed by Continental and Talcott on November 26, 1962, and a copy was filed in every county of every state in the United States. The list of locations prepared in connection with this consolidation was 184 pages long. The 1962 agreement provided again for the entire debt to be secured by every lien, stating,

"CONTINENTAL hereby pledges, assigns, transfers and conveys to TALCOTT, its successors and assigns, all its equity, right, title, and interest in and to all the collateral listed on the attached schedule B-1 to secure the payment of the Consolidated Debt and to secure the payment of all other debts and obligations now or hereafter owing from CONTINENTAL to TALCOTT"

The chattel mortgage annexed to the agreement specified that Continental owed Talcott \$4,342,027.18 and that it mortgaged all the described property "together with any and all subsequently acquired property of a similar type and description" to Talcott "for the purpose of securing payment of said indebtedness, and any extensions or renewals thereof, and to secure payment of all other debts and obligations now or hereafter owing from Mortgagor to Mortgagee or to any affiliated or related corporation of Mortgagee,"

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On April 8, 1963, the United States District Court for the Southern District of New York appointed John P. Campbell, a member of the firm of Curtis, Mallet-Prevost, Colt & Mosle, as conservator of Continental, on application of the Securities & Exchange Commission. He quickly found out that there was not sufficient cash flow to keep the Continental business operating, and wrote to Talcott on May 1, 1963 that

"I consider any arrangements by Continental with any lender made before April 8 to be abrogated

As to the Talcott accounts, you must decide how much Continental should receive. If that amount is not sufficient on a daily basis, on the judgment of myself and the men I have named to you who are charged with the operation . . . we must terminate the business."

Mr. Campbell, who had minimal bankruptcy experience, wrote the letter without the advice of his bankruptcy counsel, William M. Kahn. In fact, he testified that he disagreed with Mr. Kahn about the extent of his authority as conservator, and that his primary purpose in writing the letter was "to shake up" Talcott. In a later letter dated July 3, 1963, with reference to his May 1st letter, Mr. Campbell said it meant simply that no liens could become perfected by the passage of

"any fixed date, before, on, or after April 8, 1963. We have particularly in mind the hypothecation under the March 11, 1963 loan agreement, but include any other agreements in the statement of his position."

The March 11, 1963 loan agreement related to another financing arrangement in which Talcott, Franklin National Bank and Meadowbrook

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National Bank joined.

Mr. Campbell succeeded in borrowing \$175,000 from Talcott on Continental's conservator's certificate on May 29, 1963, with court approval. In order to keep Continental in operation, Talcott was persuaded to advance another \$200,000 on June 24, 1963; this loan was secured by notes of Apco which were issued pursuant to the April 1, 1961 agreement with that company. Those Apco notes were guaranteed by trustees' certificates of Continental. Mr. Campbell testified that the only source to keep a company like Continental alive is a person who is already deeply committed. According to him, if Talcott had not gone along with the requested loans, the Trustees would have had to liquidate the company.

On July 10, 1963 an involuntary petition for reorganization of Continental under Chapter X of the Bankruptcy Act was filed in the Eastern District of New York. On July 12, 1963, Judge Mishler (as he then was) of that court approved the petition and appointed Mr. Campbell and Irving L. Wharton as trustees.

Meanwhile, Talcott had been negotiating with Silco Automatic Vending Company in connection with the possible sale of the San Francisco, Santa Ana and Buffalo routes. On July 3rd, Talcott sent a draft of Silco's proposed offer to Mr. Kahn. This was followed by a letter on July 10, 1963 stating how the proposed sale price of \$2,850,000 had been worked out, and listing an approximation of route inventory and other "cash items" that would be involved. Talcott never claimed a lien on inventory

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under the pre-bankruptcy financing agreements.

On July 12, 1963 Mr. Campbell wrote to Mr. Hahn, Talcott's counsel, protesting Talcott's 12 percent interest rate and stating on the basis of his May 1st letter that "laches and estoppel now protect Continental." The question of interest rate was academic, since Mr. Campbell had made only three weekly payments of \$10,000 each (and did not make any more). Talcott replied that it would credit the amounts received to interest, and make later adjustments for the rate that might be determined.

The Trustees believed that it was still important to keep the manufacturing operations of Continental going. This required additional cash, to permit exhibition of a new type of vending machine, whose development was almost completed, at a trade show which would take place in September. At a meeting in Westbury on August 5, 1963, the two Trustees and their counsel presented a plan to Talcott for borrowing an additional \$550,000 or more for this purpose, and stated that without this loan they would shut down operations and that this would affect the routes on which Talcott had its liens. Talcott responded that it was ready to take the necessary steps to protect its routes, and that the depreciation in the routes would be less than the loan requested. Talcott stated that it would advance only \$100,000 and would insist that the sale of the three routes be brought before the court immediately. On August 13th, a Tuesday, Mr. Wharton informed Judge Mishler by telephone that in the absence of an

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immediate loan, he would shut down the plant on Friday. Judge Mishler agreed to meet with all the parties in his chambers the next morning.

The next day, August 14, 1963, Mr. Hahn went to Judge Mishler's chambers with Mr. Golin of Talcott and met the two Trustees, with Mr. Kahn and Mr. Dale of his office. Mr. Wharton described the emergency, pointing out that the debtor could not be reorganized without continuing its manufacturing operation, and that this would require more than \$650,000 of new money before October 1st. A loan was the only available source of money, since the various routes did not produce any cash flow. Talcott agreed to lend Apco an additional \$650,000, plus 5 percent of gross sales for salesmen's commissions, etc., as required, provided that the six routes would be sold on conditions to be worked out, and subject to the approval of the Securities & Exchange Commission, which had hitherto opposed the sale of the routes. Mr. Hahn testified that there was never any suggestion that Talcott should give up any lien as a condition for making the loan.

It was agreed that in view of the emergency, an order to show cause should be issued returnable on Friday morning, August 16th. The parties then went to the Securities & Exchange Commission to talk with the Assistant Regional Director. Neither side called him as a witness, but the purport of the conference appears to have been that the SEC would not object to the plan, but that the SEC would not agree to the perfection of any liens which were not

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valid on April 8, 1963, and that it would not approve the Trustees giving up any existing rights to attack such transactions.

Mr. Hahn, Mr. Kahn and Mr. Golin then went to Mr. Kahn's office to draft the agreement. The agreement was in the form of a letter to Talcott, signed by Apco (by Mr. Campbell as President), approved and ratified by Talcott and also approved and ratified by the Trustees on behalf of Continental. This agreement divided the routes into two categories. The Santa Ana, San Francisco and Buffalo routes were to be offered at public sale on September 9, 1963 for not less than \$2,850,000, and the funds from the sale, except inventory, were to be paid to Talcott at the closing. Talcott agreed

"to credit Continental in reduction of its debts, obligations and liabilities . . . the total amount of the funds received . . . from such sale less all payments, obligations, liabilities, costs and expenses paid or incurred . . . as more particularly hereinafter set forth."

Mr. Hahn testified that the phrase, "debts, obligations and liabilities" was agreed on as comprehensive and all-inclusive. Talcott agreed to satisfy any existing vendors' or lenders' liens. At Mr. Kahn's suggestion, a final sentence was included that after credit was given as provided "the surplus, if any . . . shall be turned over to the Trustees."

The second group of routes, Detroit, Michigan, Hammond, Indiana, and St. Louis, Missouri, were also to be offered for sale on September 9, 1963. The Trustees agreed to use the funds received

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by them from such sale (other than inventory) to pay off any liens on any specific property sold, except liens under the disputed March 11, 1963 agreement. The letter-agreement further provided that

" . . . [t]he balance of such funds plus any other funds to which the Trustees may become entitled by virtue of the sale of the above mentioned six routes shall be used as follows: First to retire any Conservator's Certificates presently remaining unpaid together with interest thereon; second to pay to [Apco] sufficient funds to enable [Apco] to pay off the total indebtedness of \$650,000 created herein; third to pay to [Apco] sufficient funds to enable [Apco] to pay any unpaid balance of [Talcott's] prior advance to [Apco] of \$200,000; and fourth the Trustees shall hold any balance of the funds received from the aforementioned sales in a separate account subject to the determination of the rights of any persons who may have claims thereon."

There followed other paragraphs concerning additional security for the loans, an agreement by Apco to sell inventory promptly, and to prosecute the collection of all accounts receivable, whether or not pledged.

At that time, the Continental indebtedness to Talcott was about \$3,400,000, and there was no indication of any bid higher than \$2,850,000, but there was always the possibility of a higher bid being made at the time of the public sale.

Later on in the afternoon of August 14, 1963 an order to show cause was signed, directing publication of notice on August 15th in the New York Times, and personal service on the morning of August 15th on five named law firms, plus Talcott, and service by mail on 34 additional individuals and firms.

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The petition for an order to show cause, signed by both Trustees, recited that, with respect to all six routes, "[b]ecause of the enormous amount of debt claimed by these secured creditors, there appears to be no equity in these routes for the debtor," but that the debtor owned the inventory of the routes free and clear. The Trustees stated that the only hope for successful reorganization of the company and for any recovery for unsecured creditors was to make a success of the manufacturing operation, the machinery in the factory being unpledged, but that this could not be done without the \$650,000 loan. The petition referred to a question about the March 11, 1963 agreement, and recited that Talcott had agreed that funds arising from the sale which might be due Talcott under the March 11, 1963 agreement might be held by the debtor without prejudice, and that the Trustees had not agreed to waive any rights to attack agreements entered into prior to April 8.

The order approving the transactions was signed after a hearing on August 16, 1963. The recitals in the order referred to Talcott's agreement to lend \$650,000 and the debtor's agreement to offer its six vending routes for sale, and then continued:

"[T]he proceeds of such sales to be used to liquidate existing secured indebtedness on the said routes and the balance of said proceeds to be used to liquidate certain administration expenses now existing on behalf of the debtor and any residue to be used by the debtor for such purposes and it may see fit, ..."

At the hearing Mr. Kahn said that the proceeds of sale

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of the Santa Ana, San Francisco and Buffalo routes "will be paid to Talcott to satisfy the liens which they have, which are in excess of the purchase price." One unsecured creditor appearing pro se, objected to the sale, apparently on the ground that the Trustees should have obtained money which he said the former president had stolen from the corporation, instead of borrowing money or selling the routes. Mr. Kahn, in answering this objection, pointed out that cash to be received from the inventory would be made available; he did not suggest that Talcott was giving up any pre-existing lien. After extended discussion, the court found that there was an emergency, that it was in the best interest of creditors and stockholders to continue the manufacturing phase of the business, that immediate funds were necessary to maintain the manufacturing operation, and that such funds were available only by the sale of the six routes. The court thereupon authorized the Trustees and Apco to execute the August 14th agreement with Talcott and to proceed with the sales.

Mr. Hahn urged the Trustees to advertise the sale widely, between August 16th and September 9th, but no other bid was made for the San Francisco, Santa Ana and Buffalo routes on September 9th, and the sale to a Talcott subsidiary, Dana Vending Co., Inc., for assignment to Silco, was approved. The sale closed on October 1, 1963, and the purchase price was paid to Talcott.

A memorandum which Mr. Golin prepared on September 27, 1963 before leaving on vacation referred to Talcott's obligation

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in the Silco deal to discharge other valid liens and encumbrances on equipment and said:

" . . . [N]o payments should be made without a specific approval by the Continental Trustees, since any payment reduces the credit which we will give to Continental against its debt to us."

On October 30, 1963 both Trustees, with Mr. Kahn, went to a luncheon meeting at Talcott to discuss a new advance of \$750,000. Among the conditions which Talcott insisted on were a current restatement of its collateral position, and the amounts owing to it, a general release of Talcott, and an agreement that the March 11, 1963 agreement be recognized as conferring a lien of \$1 million, (the new money advanced at that time) with any excess to be held in escrow. The Trustees and Mr. Kahn conferred separately for almost an hour before agreeing to these arrangements. The new loan and the release were presented for approval under an order to show cause dated November 23, 1963, which resulted in an order of December 4, 1963 authorizing the Trustees to borrow \$750,000 from Talcott for Continental (with participation by Franklin National Bank) and authorizing the Trustees to execute the specific releases attached to the order to show cause.

The Statement of Direct Liabilities to Talcott as of October 31, 1963 showed (a) \$3,174,314 due from Apco, including an accounts receivable loan of \$2,351,929 and balances due under the June 24, 1963 and August 14, 1963 loans, totalling \$822,385; (b) \$1,789,836 due from Continental, including a balance of

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\$868,124 on "vending routes and equipment loans;" and (c) a balance of \$191,128 on conservator's certificates, \$643,500 of notes in connection with the acquisition of Apco, and accrued charges of \$87,083.

The restatement of collateral prepared in connection with the November 1963 loan included several schedules. Schedule F, upon which the Trustees now rely in part, reads:

"SCHEDULE F

All amounts payable to James Talcott, Inc. under and pursuant to the agreement dated August 14, 1963 between James Talcott, Inc. and the trustees of Continental Vending Machine Corp., said agreement having been approved by Court Order dated September 21, 1963 and applicable to the payment or retirement of the obligations. Whether direct or as guarantor, of the Conservator and/or the Trustees with respect to certificates or borrowings."

By October 31, 1963 the Silco sale had been completed, Talcott had received all the proceeds, and there were no amounts payable to Talcott in respect of machines or locations on the San Francisco, Santa Ana or Buffalo routes. There were, however, as listed in Schedule G, assets used on the St. Louis and Pittsburgh routes which were subject to Talcott liens. Under the August 14, 1963 agreement the Trustees had promised to use the proceeds of sale of the St. Louis route to pay off any liens on any specific property sold, except liens created by the March 11, 1963 agreement.

The last two pages of the restatement of collateral are entitled "Statement of Actual and Provisional Credit Balances held by James Talcott, Inc. to the credit of Continental as of

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October 31, 1963 . . . " This statement recited that Talcott had received \$2,850,000 from the proceeds of the routes sold to Silco and stated:

" . . . This amount was required to be and has been credited by Talcott against the obligations owing to it by Continental subject to diminution to the extent of the amounts required under the terms of the purchase and sale to be disbursed by Talcott for the purpose of effecting a satisfaction or discharge of vendors' or lenders' liens on the assets included in the sale."

It continued that there had been a provisional credit established on Talcott's books of \$413,717.99 and that

"[T]his provisional credit will be debited with the amounts required to be disbursed by Talcott as mentioned above."

Liens against the 1963 proceeds of the three routes were satisfied as late as 1968 and 1969. A statement as of August 31, 1974 showed that there had been charges of \$164,733, leaving a balance in the Silco Reserve account of \$260,496 (exclusive of interest). No lien was presented after 1969, except one which Talcott has mentioned as having been submitted, in late 1975, during the time that briefs were being prepared in this matter.

The Trustees worked with Talcott to reduce at least three sizable claims, all of which were in fact reduced. As Mr. Hahn put it, a reduction in the prior liens would mean that Continental would receive a larger credit for the amounts realized by Talcott. After these efforts, the application of Mr. Kahn and Curtis, Mallet-Prevost, Colt & Mosle, dated November 12, 1964, for

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counsel fees, recited their participation in settling or adjusting lien claims on the California and Buffalo routes, noting that one lender's claim, made for \$47,000, had been settled for \$20,000, and saying

"All of these savings, inured to the benefit of the debtors, because each saving reduced the amount owed Talcott under a certain loan agreement."

In Mr. Kahn's affidavit of January 11, 1965, seeking to reargue the court's decision on the allowance to his firm, he referred to his work on borrowings by the conservator and the Trustees and stated that the most important piece of work he did was in connection with the August 14, 1963 agreement. He pointed out that it was only his personal efforts that persuaded Talcott to reverse its prior decision and make the loan, that without the loan the Trustees would have closed down the plant and discharged the employees, and that "there would have been a liquidation and there would not have been enough assets to pay even administration expenses. Mr. Kahn claims to have worked continuously on the draft of agreement, but he does not assert that he persuaded Talcott to give up a quarter of a million dollars of security, by waiving its rights in the Silco reserve. Mr. Campbell submitted an affidavit, sworn to January 12, 1965, supporting this application of Mr. Kahn.

Mr. Campbell's own application for allowances as conservator and as Trustee, submitted in November 1964, and comprising 116 pages, made no claim that he had obtained a waiver of any portion of Talcott's lien in connection with the August 14, 1963

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borrowing and agreement. Mr. Campbell had resigned as Trustee on September 14, 1964.

The release which Talcott had been promised at the October 30, 1963 conference was signed by both Trustees on January 24, 1964 and was So Ordered by Judge Mishler on February 10, 1964. It was a general release with three exceptions: first, the right of the Trustees to enforce any obligation of Talcott to satisfy prior liens on the equipment included in the sale of the California and Buffalo routes; second, the right of the Trustees to attack the pledge under the March 11, 1963 agreement except to the extent of the \$1 million loan made on that date; and third, the right of the Trustees to go against the former president of Continental and Apco, Harold Roth, and a large number of other individuals and corporations. Mr. Hahn had drawn the release and sent it to Mr. Campbell to prepare the clauses concerning the exceptions. No exception was made for any obligation to apply any part of the proceeds of the sale of the three routes to reduce conservator's certificates or trustees' certificates, which the Trustee now claims Talcott was obliged to do after satisfying the specific liens on the Silco route items.

The first suggestion that Talcott should apply the Silco reserve to payment of the certificates it held rather than to reduction of Continental's indebtedness, was made in 1969 or 1970 by new counsel for Mr. Wharton as Trustee.

The effort to preserve the manufacturing operations by

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selling the routes and borrowing more money from Talcott was a substantial success. Before 1974 it was possible to sell the manufacturing business for over \$4 million, although Judge Mishler testified that machinery in the factory was worth only \$100,000. The terms of sale of the manufacturing business involved the possibility of getting \$6 million. Counsel for the Trustees informed this court on July 1, 1975 that there was then about \$5 million available for distribution.

The statement of facts above represents a composite statement of all the documents and testimony. A brief description of particular witnesses is appropriate.

Mr. Hahn, who was the only witness for Talcott, told of his participation in drafting the August 14, 1963 agreement. He emphasized, in addition to the inferences from the documentary evidence, that no one had ever stated that Talcott was expected to give up any security interest in order to obtain the sale of the three routes which Silco bought.

Witnesses for the Trustee were Mr. Campbell and Chief Judge Mishler, plus a deposition of Mr. Wharton on written questions pursuant to F.R.Civ.P. 31. Mr. Wharton was recuperating from a heart attack and was unable to withstand the stress of cross-examination.

Mr. Campbell stated that he would not agree to perfecting any lien which was not valid before April 8, 1963, even though the estate required fresh money. He confirmed the view that the routes

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were fragile, subject to raiding, and therefore that it was preferable to preserve the manufacturing business at the expense of the sale of the routes. There had been a raid on the Buffalo route, which he thought the former manager was behind. He stated that there were very few vending machine routes which had been preserved as long as three months. Mr. Campbell knew of the 1960 and 1961 financing agreements and remembers that there was a November 1962 agreement. He recalled some discussion about the liens to be satisfied, but could not recall what it was. He had no recollection of Talcott ever saying that it could apply the proceeds of sale against a general lien; but he did not assert that Talcott ever agreed to give up any part of a previously valid lien. He admitted having told the court in 1963 that the debtor had no equity in the Silco routes, but testified in this proceeding that someone could always have bid more and thus create equity. Up to the time of his resignation as Trustee, he had not made any request to Talcott to pay over or apply any of the Silco Reserve to conservator's or Trustees' certificates.

Chief Judge Mishler's testimony was received over Talcott's objection to its relevance. He stated that he had a telephone talk with Mr. Wharton on the afternoon of August 13th about the imminence of closing the manufacturing operations, and that he suggested a meeting in his chambers on the morning of August 14th. Mr. Wharton came first and talked about the condition of the company. When Mr. Hahn arrived, he said that Silco

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was ready to make a firm offer for three routes. This alone would not keep the manufacturing business going because the capital debts against the routes were more than the income by several hundred thousand dollars. The Judge explained that the reason why the proceeds of these three routes were to be received by Talcott was that Talcott knew the most about the liens on the routes and because Talcott's books were better than Continental's. It was agreed that the inventory could be used by Continental. Mr. Hahn did not talk of any general lien, nor did he talk of returning any surplus to the Trustees. Judge Mishler's description of the events of August 14 and 16, 1963 was essentially corroborative of Mr. Hahn and Mr. Campbell. He remembered that in view of Continental's desperate situation, Talcott agreed on Wednesday to advance enough money to meet the Friday payroll for the factory.

The extent of confusion which was caused by Talcott's choice of nomenclature is shown by Chief Judge Mishler's letter of June 25, 1975 to Mr. Schlossberg, during the correspondence about his possibly being called as a witness. As is evident from that letter, Talcott's counsel had given him the impression at the original hearings in the Silco Reserve issue that a general lien was a device for giving unsecured debts a right to participate in security. In this letter, written without reference to the Court of Appeals opinion in this case, Chief Judge Mishler expressed doubts as to how a general lien could be recorded.

Mr. Wharton stated that he had practiced law for five

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or six years before 1940 and had been in various other business in the intervening years, ending up as a mortgage broker. He said Talcott was always a reluctant lender, but that he was able to get enough money from them to keep the debtors in business. In August, 1963, Talcott insisted on a sale of the routes and he urged that Talcott make the \$650,000 loan partly in order to minimize the losses on the sale of the routes. They had to deal with the question whether the SEC would object to the sale of the routes. When he went to the SEC, the only requirement was that the Trustees waive no rights to attack any pre-bankruptcy agreement. Mr. Wharton recalled that Judge Mishler had stated that the proceeds of the routes should stand in place of the routes themselves. Mr. Wharton did not believe Talcott could liquidate the routes successfully if Continental were not in business. His recollection of the conversations was that they related only to the distribution of proceeds of sale to the payment of specific liens, and that there was no discussion of the pre-April 8th financing agreements or of the November 1962 mortgage. He was not asked whether there was any discussion of requiring Talcott to waive any existing liens, and volunteered no statement on the subject.

At a pretrial conference in this proceeding, Talcott's counsel said that they would call Mr. Hahn, and perhaps Mr. Kahn. The Trustee's counsel said that they would call Messrs. Campbell and Kahn and Chief Judge Mishler, and Mr. Wharton later when his health was restored. Actually, neither side called Mr. Kahn.

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The Trustee's counsel stated at this same conference that the claim that Talcott would receive a preference was not being pressed.

No evidence was offered to suggest that the application of the Silco Reserve to Talcott's pre-bankruptcy indebtedness would constitute a preference. The issue here was presented as simply whether the intent of the parties was that the surplus from the sale of the routes, over the so-called specific liens, should be used to pay the conservator's and trustees' certificates and not to pay Talcott's pre-existing debt.

As of the time of the confirmation of the amended plan of reorganization, it appeared that liquidation of all of Talcott's security against Continental's debts would leave a deficit of over \$800,000, while liquidation of all of the security against Apco's debts would leave a surplus of almost \$400,000 for the Apco estate. In re Continental Vending Machine Co., 517 F.2d 997, 999 (2d Cir. 1975).

Discussion

There is little dispute about the general principles of law which are applicable. A lien which is valid at the beginning of a reorganization proceeding remains effective throughout the proceedings. Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (2d Cir. 1940). Generally a creditor may allocate moneys it receives in a way to obtain the fullest advantage of its secured position. United States v. Pollack, 370 F.2d 79, 80-81 (2d Cir.

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1966). A cross-collateral clause gives an effective lien on all security for all amounts due to a factor, Matthews v. James Talcott, Inc., 345 F.2d 374, 379 (7th Cir.), cert. denied 382 U.S. 837, 86 S.Ct. 84 (1965).

The phrase "general lien" was used in the Matthews opinion in the same way in which Talcott has used it here, with reference to the effect of a cross-collateral clause, 345 F.2d at 379. The record does not indicate, however, that the Matthews opinion was ever called to Judge Mishler's attention when he was passing on Talcott's original motion.

The Court of Appeals in this case recognized the validity of cross-collateral agreements such as were provided in Talcott's financing agreements of 1960, 1961 and 1962 (491 F.2d at 815).

The evidence establishes that Talcott indeed had a right to satisfy all of Continental's indebtedness to it from the proceeds of any items on which it had a lien. The Trustee therefore faced a steep uphill fight in trying to show that Talcott agreed to give up any portion of the sale proceeds for the sake of being able to lend an additional \$650,000 to Continental. It is true that the new loan was of some benefit to Talcott, by keeping the business alive and facilitating the sale of the routes. However, the Trustees' need for the loan was most urgent. The Trustee has not shown that the obstacles to foreclosure of Talcott's lien were so serious that it would give up a quarter of a million dollars of security in order to enforce its right to sell.

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There was no evidence that anyone said in 1963 that Talcott was required to give up any valid lien. No basis was advanced at the hearings for any plausible attack on Talcott's liens under the 1960, 1961 and 1962 agreements, all made more than four months before any insolvency proceedings.

One of the arguments pressed by the Trustee concerns the "surplus" provision in the August 14, 1963 agreement. The Trustee argues that the circumstances existing at the time of the August 14th agreement support the inference that the proceeds of the Silco routes were to be applied only against the so-called specific liens that Talcott held against those routes; since there was no indication of any bid higher than \$2,850,000, and the total indebtedness was \$3,400,000, there could not be any "surplus" if the proceeds were applied to the "general lien". Talcott responds that there always existed the possibility that a higher bid might be made at the time of the sale, and that the "surplus" provision simply recognized the possibility that a bid in excess of the total indebtedness to Talcott might come in at the public sale. This latter provision is consistent with the language used earlier in the agreement, to the effect that the Trustees would sell the three routes "for not less than \$2,850,000." (Emphasis added). In any event, the Trustee's interpretation would give an unjustifiably narrow meaning to the words "debts, obligations and liabilities" in the agreement.

Moreover, it is significant that Talcott's claim on the

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Silco Reserve was not excluded from the November 1963 release, which was given when Talcott joined in another \$750,000 loan. The only exception in the release which relates to the Silco Reserve was the reference in paragraph (a) to Talcott's obligation to satisfy any prior lien on any of the equipment on those routes. There is no exception for any claim by the Trustees to have Talcott apply any funds in its hands to payment of conservator's or trustees' certificates.

In the description of the Silco sales proceeds at the end of the restatement of collateral, it is significant that Talcott stated that it had established a credit on its books of \$413,717.99 which "will be debited with the amounts required to be disbursed by Talcott as mentioned above" (to pay off prior vendors' and lenders' liens) and then continued:

"This liability on the part of Talcott for such disbursement is excepted from the release to be given by the Trustees to Talcott. . . ." (Emphasis added).

In other words, before the release was executed by the Trustees, Talcott made plain that what was intended to be excepted from the release was not the Silco Reserve, but Talcott's obligation to use part of the Silco Reserve, so far as necessary, to satisfy prior liens on the San Francisco, Santa Ana and Buffalo routes.

The Trustee argues that Schedule F of the restatement of collateral nevertheless indicates another implicit exception to the general release. Schedule F in the restatement of collateral as of October 31, 1963, however, refers only to "amounts payable to

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James Talcott, Inc.," not to amounts already received by Talcott. The Trustees evidently regarded it in this way in 1963, for they drafted the exceptions to the release, and did not include the exception which they now say Schedule F created.

The Trustee says that Talcott should have asserted its "general lien" more clearly when given an opportunity. This argument ignores the fact, already mentioned, that the August 14, 1963 agreement stated without qualification that the "debts, obligations and liabilities" of Continental were to be paid out of the proceeds of sale of the three routes.

The Court of Appeals rejected the Trustee's original argument that the recitals in the order of August 16, 1963 limited the meaning of "debts, obligations and liabilities" in the August 14, 1963 agreement. 491 F.2d at 820. In any event, the reference in the recital to "existing secured indebtedness on the said routes" should be interpreted in the light of the fact, now established, that all Continental's obligations to Talcott were secured on those routes. Finally, if the Silco Reserve had been freed from the Talcott lien, this significant accomplishment would surely have been mentioned in the fee applications of the Trustees and their attorneys. The absence of any such reference indicates that the claim of Mr. Wharton as Trustee to have the Silco Reserve applied to conservator's and trustees' certificates was a new idea conceived by counsel who came into the case late, without the factual background which has now been supplied,

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The court finds that the Silco Reserve should be credited in reduction of Continental's indebtedness to Talcott, even though this leaves no surplus to apply to the payment of conservator's or trustees' certificates.

Since the issue referred to this judge constitutes only a part of those presented on Talcott's motion, Talcott should draft an appropriate order implementing this decision, to be submitted on three days' notice.

JUDGE MISHLER'S DECISION AND ORDER,
MAY 22, 1974, REFERRING TALCOTT'S
PROOF OF CLAIM TO SPECIAL MASTER

In a memorandum decision dated April 10, 1974, this court directed James Talcott

to submit a proof of claim within thirty days of the date of this memorandum of decision, setting forth the charges for legal, accounting and other miscellaneous expenses for services rendered after the filing of the petition totaling approximately \$638,000. The proof of claim shall explain in detail (1) the date the services were rendered; (2) the nature of the services; (3) the time involved; and (4) the date payment was made.

A "Proof of Secured Claim of James Talcott, Inc. for Charges" was filed with this court on April 30, 1974. Although the proof of claim is voluminous, the court finds that it does not provide the information requested by the court in its memo-

JUDGE MISHLER'S DECISION AND ORDER
MAY 22, 1974, REFERRING TALCOTT'S
PROOF OF CLAIM TO SPECIAL MASTER

random of decision. Two affidavits submitted by J. Jacob Hahn totaling 100 pages describe in general terms the services rendered on behalf of Talcott. These affidavits, however, fail in most instances to specify the dates on which the particular services were rendered and the number of hours expended on those dates, the precise nature of the services, the individuals who performed each particular service, and the reasonable value of each item claimed.^[1]

^[1] For example, Hahn's affidavit of March 14, 1973, states in ¶92 (p.50) that:

A comprehensive answer was prepared by deponent containing denials and eight affirmative defenses, reciting the complete history of Talcott's relationship and transactions with the Conservator and with the trustees and which defenses included release, estoppel, account stated and new credit extended ... Considerable research in support of these defenses was done by a senior associate. A copy of the answer was later served on the trustee's counsel.

This paragraph is but a single, representative example. Nowhere does Hahn state the date or dates on which this answer was prepared or served, the number of hours devoted to the preparation, or the reasonable hourly value of the senior associate's time. Although the substantive content of the answer is recited, the affidavit does not indicate the actual nature of the services performed, other than stating simply that "[c]onsiderable research ... was done."

Ub ¶165 (p.82), the affidavit summarizes the total amount of time expended by Hahn, two other named individuals, and "other associates." This summary, however, does not indicate the amount of time devoted by particular individuals to particular matters, nor does it assign a reasonable value to the services performed by each individual.

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The five invoices submitted as exhibits to Hahn's affidavit of March 14, 1973 contribute nothing.^{/2} Again, the services rendered are described in very general terms^{/3} and the fee charged is presented as one lump sum at the end of each invoice.

The claimant bears at all times the burden of establishing the validity of his claim by a fair preponderance of the credible evidence. See, e.g., United Hotel Co. v. Mealey, 147 F.2d 816 (2d Cir.1945); 6A Collier, On Bankruptcy, ¶9.04 at 162-63 (1972). Talcott's proof of claim is not even sufficient to meet his burden of production or going forward, cf. Schwartz v. Mills, 192 F.2d 626, 730 (2d Cir.1951), and therefore fails to establish a prima facie case.

^{/2} Exhibit A-1 and parts of Exhibit A-2 are completely illegible.

^{/3} For example, Exhibit A-4, entitled "General Electric Credit Corp. litigation" is an invoice in the amount of \$30,000 for "professional services rendered commencing about December 1964 in a suit by General Electric Credit Corporation (herein GECC) against client and Franklin National Bank ..." The enumerated legal services included: "[a]nalysis of the complaint's several causes of action and research of the underlying law;" "[f]urther consideration of application of Attorney General's office and analysis of his motion papers ...", "conferences with client and with co-defendant bank ..."

JUDGE MISHLER'S DECISION AND ORDER
MAY 22, 1974, REFERRING TALCOTT'S
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The court, however, will not order Talcott to file an amended proof of claim; rather, in order to expedite the resolution of this claim, the court hereby directs Talcott to submit further proof of his claim in the form of oral testimony or written documents to United States Magistrate Vincent A. Catoggio. Cf. In re Welborne, 266 F. 385 (S.D.N.Y.1920). Magistrate Catoggio, as Master, shall hear and report on the reasonable value of the claim. The Master shall make findings of fact as to the nature of the services rendered, the time consumed by each item, and the reasonable rate per hour for the particular service performed (taking into account the professional standing of the lawyer, accountant, or other individual performing the services). In so doing, the Master shall consider all relevant factors, such as the novelty or complexity of the factual or legal issues, the importance of the services to the estate, and the benefit derived by the estate from those services.

The Master shall commence hearing the issues on or before the 24th day of June 1974 and shall file a report with findings of fact and conclusions of law together with a transcript of the proceedings on or before August 5, 1974. The time for filing the Master's report may be extended on oral application to the undersigned by the Master.

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The report of Vincent A. Catoggio, Magistrate, serving as Special Master herein respectfully reports:

By order dated May 22, 1974, the undersigned was designated to take testimony and report to this Court his findings and conclusions with respect to "Proof of Secured Claim of James Talcott, Inc., for charges" filed in this Court on April 30, 1974 in the reorganization proceedings of Continental Vending Machine Corp., and Continental Apco Inc.*

James Talcott Inc., in lengthy affidavits with exhibits attached filed April 30, 1974 made claim for attorney's fees which it long ago paid to Messrs. Hahn, Hessen, Margolis and Ryan because of services performed in connection with loans made to the above-named debtors pursuant to the terms of a loan agreement as will be referred to later herein, in the sum of \$267,490.58** including disbursements and \$95,645.38*** labelled "Auditing,

* Hearings were delayed by a number of circumstances principal among which were the eye operations of Jacob Hahn the principal witness for the claimant, the introduction in evidence of voluminous records dating back to 1963 and subsequent years which required prior review and study and engagements of counsel in other matters from time to time during the hearings.

** Claimant's brief p.20 says as to its attorney's \$60,000 bill dated January 4, 1974 attached to supplemental affidavit Jacob Hahn, "determination of the reasonable value of these services cannot and should not be made at this time" even though already paid.

*** The claim stated this item in the sum of \$101,705.38 (Fairberg Affidavit - p.2) but this figure was revised (Tr. 1172).

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Collection and Miscellaneous Charges", all for the period from March 30, 1963 through March 8, 1974. Claimant has reserved the right "to file additional proof or proofs of claim for any charges, within the purview of the provisions in the factoring and financing agreements, that may be incurred by claimant subsequent to April 30, 1974". (Fairberg Affidavit p. 4).

The order of reference directed, after commenting on the insufficiency of the written claim herein which is made up of extensive affidavits with exhibits attached:

". . . in order to expedite the resolution of this claim, the court hereby directs Talcott to submit further proof of its claim in the form of oral testimony or written documents to United States Magistrate Vincent A. Catoggio. Cf. In re Welborne, 266 F. 385 (S. D. N. Y. 1920). Magistrate Catoggio, as Master, shall hear and report on the reasonable value of the claim. The Master shall make findings of fact as to the nature of the services rendered, the time consumed by each item, and the reasonable rate per hour for the particular service performed (taking into account the professional standing of the lawyer, accountant, or other individual performing the services). In so doing, the Master shall consider all relevant factors, such as the novelty or complexity of the factual or legal issues, the importance of the services to the estate, and the benefit derived by the estate from those services".

Pursuant to the aforementioned order some 1655 pages

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of testimony have been taken and some 180 exhibits have been marked in evidence, some exhibits running into many, many pages. Transcripts of this testimony are being filed herewith with the Clerk with copies of this report for mailing to the attorneys for the parties herein together with their briefs. The exhibits, many of which are copies of papers already on file in this Court, are being retained by the attorneys.

H I S T O R Y

Continental Vending Machine Corp., a New York Corporation hereinafter called Continental, engaged in the business of operating machines which dispensed candy, cigarettes and kindred merchandise in various areas of the United States. These were designated as The Hammond Indiana Route, The St. Louis Missouri Route, The Detroit Michigan Route, The Pittsburgh Pennsylvania Route, The Buffalo Route, The Santa Ana Route, The San Francisco Route and others.

Continental Apco Inc., a New York Corporation hereinafter called Apco a wholly owned subsidiary of Continental Vending Machine Corp., engaged in the business of manufacturing, repairing and maintaining vending machines used by its parent.

On July 5 and July 10, 1963 the petition of Continental for reorganization under Chapter X was filed and on October 4, 1963 Apco's similar petition was filed and the same Trustees were designed to serve in both reorganizations.

From at least some time in 1961 James Talcott Inc., a

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New York Corporation, had acted as factor and financier for both debtors and had advanced to both of the debtors substantial sums of money pursuant to factoring and financing agreements which the debtors had executed at and before the filing of the respective petitions for reorganization herein. The debtors are said to have been indebted jointly and severally to Talcott in a sum amounting to \$2,140,100.23 plus \$932,352.59 according to an order of this Court dated December 4, 1963 plus \$1,237,210.30 and \$119,711.00 all with interest and charges as per agreement. (Affidavit James J. Coy - par. 2).*

All bans by Talcott as aforementioned were secured, the earlier ones were fully secured by chattel mortgages, assignment, etc., and those made after the filing of bankruptcy petitions were secured to a limited extent by assignment with Court approval, of debtor's equity in specified property.

CLAIMANT'S CONTENTIONS

It is Talcott's contention that the loan agreement quoted below commissioned Talcott to direct its attorneys to take all reasonably necessary steps to protect and liquidate Talcott's security interest in the debtor's property and that the attorneys' charges and expenses therefor are reimbursable to Talcott by the debtors. Accordingly, the legal services for which Talcott seeks

* Other evidence indicates that the debtors owed Talcott some \$6,000,000 late in 1963 (Fairberg 1238).

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to be reimbursed herein cover a wide range and they deal not only with efforts to enforce payment of the evidences of indebtedness of the debtors to it but also extensive services allegedly designed to and which did in fact protect Talcott's equity in pledged property and its security interest in various property of the debtors.

Because of the inherent complexities and because of complications which developed in the operations of the debtors, Talcott claims that in order adequately to protect Talcott's security interest in the property of the debtors it was necessary for Talcott's attorneys to engage in proceedings and render services usually not involved in the ordinary enforcement of notes evidencing indebtedness of the debtors. Nevertheless these services formed part of the enforcement of the notes. The attorneys for Talcott protected, asserted and helped liquidate collateral securing approximately \$6,700,000 of the debtor's obligation (Exhibit 3(a)). The attorneys' services resulted in recoveries of over \$3,000,000. The services in connection with liquidation of the San Francisco, Santa Ana and Buffalo routes alone resulted in recovery of \$2,850,000 which, after satisfaction of superior liens netted approximately \$2,400,000. The services in connection with the liquidation of the New York and New Jersey Routes and related litigation resulted in recovery of \$155,000. Litigation by Talcott against Vending Unlimited, Morris Silverman, Melvin Chasen, et al., resulted in recovery of \$470,000. Thus

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besides satisfying the debtor's secured obligations to Talcott, these matters produced a surplus of approximately 1 Million Dollars which Talcott now holds and which is drawing interest.

Thus argues Talcott, when we consider "the benefit derived by the estate" from services rendered by Talcott's lawyers, it seems that we must bear in mind the desperation in which the debtors found themselves and how Talcott's lawyers infused life into the debtors by arranging loans to the debtors at critical times. By bringing about sales of routes as "going concerns" Talcott's money not only was provided to the debtors in extremis but also the sales of routes as "going concerns" served to preserve the value of Talcott's security and forestall the presentation by Talcott of monstrous unsecured claims. They insist that if they had attempted to liquidate their security merely by selling vending machines as vending machines instead of selling routes as "going concerns", the amounts which would have been realized would have been shockingly small in comparison to what actually was realized.

Because of all of this and because of the complexities and difficulties of the problems which called for unusual expertise and because of the benefit enuring to the debtors from the services of Talcott's counsel, the claimant urges that it would be most inequitable to apply mundane reorganization principles borrowed from cases where attorneys for Trustees or for creditors

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committees seek reimbursement out of a debtor's property for simple and direct services to or against a debtor in reorganization.

THE TRUSTEE'S CONTENTIONS

In a brief submitted to me by the trustee, he asks that two questions be answered namely:

1. What are reasonable attorney's fees?
2. For which services rendered should Talcott be reimbursed?

The Trustee further says:

"We submit that in determining the amount to be allowed to Talcott in its present application, four questions must be answered:

- (1) What standards are applicable in fixing reasonable attorney's fees in a reorganization proceeding?
- (2) What is the rate of compensation applicable in reorganization proceedings?
- (3) What is the effect of the failure of the attorney to maintain proper time records?
- (4) For which legal services may be the creditor be properly reimbursed?" (Br. p. 2)

The Trustee contests the claim along the lines above indicated and urges that the hours of service and the hourly rate of payment be reduced in conformity with the following: *

* The figures stated will be discussed at length later herein.

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	<u>CLAIMED</u>			<u>UNCONTESTED</u>		
	Hours	Rate	Charge	Hours	Rate	Charge
Jacob Hahn	1450**	100-150		355	50	17750
Abeson	2243	50		475	25	11875
Ryan	321	70-110		321	35	11235
Novick	237	45		0	25	0
Associates	<u>45</u>			<u>0</u>	—	<u>0</u>
	4296	\$205,000		1151		\$40860

The trustee contests the following claimed disbursements:

100 Travel Expense
653.91 Printing Costs
549.16 Printing Costs
4500 Cost of bond
re appeal as to Certificates

The Trustee does not dispute disbursements of \$2,490.58 through 1969 and disbursements of \$741.01 for January 2, 1973 to March 8, 1974 and he accepts the estimates of time consumed by Talcott's attorneys who marked in evidence many documents in support of their time estimates but the Trustee invites careful scrutiny of these estimates (Br. p. 36 - 37). The Trustee suggests that the claimant be penalized in some manner because of the failure of its attorneys to keep accurate and contemporaneous time records but the Trustee doesnot himself impose any such sanctions in his computations.

** Claimed at p.82 of Hahn's affidavit are 1700 hours but this was amended at the hearings to 1450 hours.

*** Brief p. 35

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THE AGREEMENT

Loans made by Talcott to the debtors prior to their filing of petitions for reorganizations as well as a loan by Talcott to the Trustee (which has been paid) of \$500,000 as per order dated December 4, 1963 were made subject to an agreement which contained language identical with or substantially similar to the following:

"In the event of any breach by the undersigned of any provision of this agreement and/or upon the termination of this agreement the undersigned will repay upon demand all obligations to you of the undersigned and in addition thereto all costs and expenses incurred, including a reasonable allowance for attorney's fees, to obtain or enforce payment of any receivable assigned or of any obligations of the undersigned to you, or in the prosecution or defense of any action or proceeding either against you or against the undersigned concerning any matter growing out of or connected with this agreement and/or the receivables assigned or any obligations of the undersigned to you."

Casual analysis of the language in the loan agreement quoted above reveals that "a reasonable allowance for attorney's fees" shall be payable:

1. "to obtain or enforce payment . . . of any obligation of the undersigned"

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2. "In the prosecution or defense of any action or proceeding" either against Talcott or the debtors "concerning any matter growing out or connected with this agreement . . ." Thus it seems clear that attorney's fees are payable only in connection with enforcing payment of a receivable assigned or the debtors' obligation or in connection with a suit by or against Talcott or the debtors concerning any matter growing out of the agreement. Unless the services fall within either of these two categories compensation for them may not be allowed herein.

That the terms of the agreement control what legal services are compensable herein seems to be conceded by the Trustee who makes repeated reference to the terms of the agreement in his brief (pages 26, 30, 32 and 34)(reply brief pages 4, 5 and 6).

Talcott, citing Brown v. Security National Bank of Greensboro, 200 F. 2d 405, insists that it is entitled to the fees it paid its attorneys herein for services in protecting the security pledged to it. In Brown the loan agreement provided "and shall take such steps as may be necessary and proper for the enforcement of said indebtedness against the security given". There the lender's attorneys gave attention to the operations of the debtor's business by the Trustee and they attended numerous hearings relating thereto, for which they were allowed substantial compensation.

That services covered by a prior agreement are compensable in a reorganization proceeding even though the award must be

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paid from the reorganization fund, is well established. Matter of General Stores, 278 F. 2d 437 CA 2 1960; Ruskin v. Griffith (General Stores), 269 F. 2d 827 at 834, CA 2 1959. See also In Re Intaco Puerto Rico, 357 F. Supp. 1122 and Security National v. Powers, 278 U. S. 149 - 153.

PERIPHERAL QUESTIONS INVOLVED

The Trustee in his brief says p. 46

"we think it important to emphasize again that the present proceeding is not one to fix the amount of the attorneys fees. The work performed by the Hahn firm has been billed to and paid by Talcott. All that is at issue in these proceedings is the extent to which Talcott, a secured creditor, may be reimbursable from the assets of the debtors for the legal and other services which were performed". This quotation points out a bothersome question in this matter.

The claimant cites Sampsell v. Monell, 162 F.2d 4 CA 1947 where the Court in allowing a fee payable to an attorney commented at p. 6:

"The fee was payable to a third party pursuant to a contract and was not one payable to a party to the bankruptcy proceeding wherein the fee is governed by a strict rule of economy of administration".

The Trustee contends that the Sampsell case has been rejected by the Courts (Br. 4), but to the contrary the case was

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cited by the Ninth Circuit in 1968 in Levitt v. Robinson, 402 F. 2d 754, and the Southern District of Texas in Wextec Corp., 313 F. Supp. 1303 (1970) wherein the fees allowed were anything but penurious and In Matter of Neill Properties, 360 F. Supp. 916 S. D. Cal. 1966.

The claimant submitted the testimony of Frederick Ballon an attorney, one of eight partners in Ballon, Stoll and Itzler of 1180 Avenue of the Americas forty percent of whose practice is in bankruptcy. He testified that the reasonable value of the services of Mr. Hahn's firm was between \$200,000 and \$250,000. That this Court has the expertise and is authorized to exercise the prerogative to determine what reasonable attorney's fees are, is unquestioned. The difficulty here, however, is that this was not a simple proceeding where the Court is called on to fix a reasonable fee based on affidavits. Rather this is a case where an adversary hearing was held in which both sides were given an opportunity to submit proof in regard to fees already paid by Talcott to its attorneys. Talcott availed itself of this opportunity but the Trustee rested on the testimony given on behalf of Talcott without putting in any contradictory proof.

If instead of furnishing money to the debtors, Talcott had furnished material for the manufacture or repair of vending machines or cigarettes or candy for sale in them and which it had obtained and paid for under an agreement that the debtors would pay the fair and reasonable market value of those supplies, it

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seems that for the Trustee to contest what the reasonable value of them was, he would be required to submit proof as to their value. Talcott says that the Trustee improperly delayed until now in contesting these charges even though he was advised of them much earlier.

TIME ALLOWED*

The Trustee not only disallows all except \$40,860 of the \$205,000 claimed for legal services but he also disallows all but 1,151 hours of a total of 3,552 claimed. That the Trustee has fallen into serious error is apparent from his denial of Item IX - PREPARATION AND FILING OF PROOFS OF CLAIM (TR 783-798). For he says at page 29 of his brief without stating any authorities to support him:

"It is well settled that the debtors may not be charged with the cost of a creditor's preparation of a proof of claim and accordingly the Trustee rejects this time".

The filing of a proof of claim was as necessary an incident to Talcott's collection on its notes as would be the filing of a summons and complaint in a civil suit to enforce payment. It is abundantly clear that the terms of the loan agreement herein expressly provided for expenses incurred in enforcing payment of the notes. See Ruskin v. Griffiths, 269 F. 2d 827; Intaco Puerto Rico, 357 F.Supp. 1122; In Re Schrader Body Inc., 315 F.Supp. 1349.

* In discussing this topic the pattern set in Talcott's claim wherein Mr. Hahn's two affidavits list twenty-four areas of services will be followed.

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The error thus demonstrated in the Trustee's analysis of this one point in the claim permeates the Trustee's analysis of the many other points in the claim.

I now consider each item in the claim seriatim.

I. INVESTIGATION BY AND PROCEEDINGS INSTITUTED BY SEC AND SUBSEQUENT CONSERVATORSHIP.

Mr. Hahn claimed 187 hours. Trustee concedes 5 hours. I allow 187 hours.

Talcott's time claimed is fully supported by the testimony appearing at pages 5 - 175 of the transcript. The appointment of a conservator in effect and in fact was a Court proceeding which materially affected the security which Talcott held. The legal services rendered in connection therewith were part and parcel of the services to "enforce payment". All of these services were relating to, in conjunction with or the result of a Court order.

II - PROCEEDINGS AFFECTING NEW YORK AND NEW JERSEY ROUTES

160 hours by Mr. Hahn claimed. Trustee concedes 99 hours. I allow 160 hours as supported by testimony. Transcript 177 - 251; 260 - 314.

The Trustee objects to the services related in paragraphs 31, 32, 35 and 36 which involved the preparation of schedules, appearances in Court and conferences with respect to the program for the sale of the Routes. It is difficult to understand why part of the services in connection with the sale should be allowable and not all the services particularly Court appearances.

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All of these services were part and parcel of Court proceedings materially affecting Talcott and the security it held. They were part of the service to "enforce payment".

III - LOAN BY TALCOTT TO TRUSTEE OF \$650,000 AUTHORIZED BY COURT ORDER.

39 hours by Mr. Hahn claimed. No hours conceded by Trustee. I allow 39 hours. The time is fully supported by testimony (Tr. 315 - 366). This loan was imperative to the survival of the debtors and it provided insulation and protection for the security held by Talcott on other loans. These services were part and parcel of Court proceedings materially affecting Talcott and the security it held. They were part of the service to "enforce payment".

IV - SALE OF PORES PURSUANT TO AUGUST 14 AGREEMENT AND COURT ORDER, OTHERWISE NOW KNOWN AS SILCO TRANSACTION.

Claimed 44 hours for Mr. Hahn, Mr. Novick 175 hours and associates 45 hours. The Trustee denies this claim in toto. I allow 44 hours to Mr. Hahn, 175 hours to Mr. Novick and 45 hours to associates as supported by testimony at pages 367 - 399.

The Trustee in his objection to this item relies on an unreported decision a copy of which is being filed herewith entitled, In the Matter of Cambridge Nuclear Corporation - District of Massachusetts, June 25, 1974 in which Chief Judge Caffrey said:

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"it should be noted that each case must be decided on its own facts and circumstances as evidenced by the record before the Court".

Rates ranging from \$100 per hour down to \$40 per hour were allowed in that case. The Trustee says:

"Services performed in connection with the sale of a debtor's assets are not reimbursable to the attorney for a secured creditor as such services are properly performed by the Trustee's attorney".

The answer is each case rests on its own facts. The fact is that the attorneys for Talcott were the ones who made and consummated extensive arrangements for the sale of The Santa Ana, The San Francisco and The Buffalo Routes for \$2,850,000. It was not in the power of the Trustee to make these arrangements. In addition Talcott's attorneys had to follow the progress of the sale of The Hammond Indiana Route for \$330,000, sale of The Detroit Route for \$900,000, sale of the equipment of The St. Louis Route exclusive of cash and inventory of the machines for \$175,000. All of the foregoing required close scrutiny by Talcott's attorneys because security held by Talcott was involved in each and every transaction. The net benefit to the debtors was that they recovered approximately \$450,000 as free assets in the six routes. Additional sums were escrowed for future distribution.

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V - AGREEMENT OF NOVEMBER 20, 1963 AND THE LOAN OF \$650,000 THEREUNDER.

Mr. Hahn claims 93 hours. The Trustee rejects this item in toto. I allow 93 hours as supported by testimony - pages 464 - 575. The Trustee contends that none of this is reimbursable because it involves a new and separate transaction not covered by the original loan agreement. The error of this argument lies in the fact that but for this loan the debtors would have collapsed entirely and the security held by Talcott would have depreciated in value markedly.

VI - TRUSTEE'S FUND HELD IN SPECIAL ACCOUNT

The Trustee concedes that 36 hours of Mr. Hahn's time as supported by testimony 660 - 669 are allowable.

VII - SERVICES IN CONNECTION WITH THE CHEMICAL RESERVE

The Trustee accepts the total of 30 hours spent by Mr. Hahn as supported by testimony pages 836 - 852.

VIII - RECOVERY OF PROCEEDS OF PLEDGED CANADIAN ASSETS

The Trustee accepts the 15 hours claimed by Mr. Hahn in support of testimony - pages 668 - 723. Which I allow.

IX - PREPARATION AND FILING OF PROOFS OF CLAIMS

Mr. Hahn claims 15 hours which I allow as supported by testimony - pages 793 - 798, for reasons stated above.

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X - CLAIM OF IRS AGAINST TALCOTT FOR \$103,569 ALLEGEDLY OWED BY CONTINENTAL AND \$33,482 ALLEGEDLY OWED BY APCO FOR WITHHOLDING TAXES.

IRS claimed that Talcott owed these monies because it had advanced payrolls. Mr. Hahn claims 5 hours and Mr. Novick claims 62 hours all of which the Trustee rejects but which I allow. The time expended is supported by testimony at pages 798 - 812. The loan agreement provided that the borrower would pay "all costs and expenses incurred ... in the prosecution or defense of any action or proceedings either against you or against the undersigned concerning any matter growing out or connected with this agreement ..."

XI - PREFERENCE ACTION BROUGHT BY TRUSTEE TO RECOVER ALLEGED PREFERENTIAL PAYMENTS.

Mr. Hahn claims 10 hours and Mr. Abeson 10 hours. All of which the Trustee rejects on the ground "that a creditor may not seek to recover costs for defending a preference action brought by the Trustee". I allow Mr. Hahn 10 hours and Mr. Abeson 10 hours as supported by testimony - pages 575 - 594. Again we have a proceeding against Talcott for a "matter growing out or connected with this agreement".

XII - PROCEEDING BY AMERICAN CATALOGUE CO.

The Trustee accepts the claim of 20 hours spent by Mr. Hahn and 50 hours spent by Mr. Abeson. These are allowed as they are supported by testimony - pages 826 - 836.

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XIII - SERVICES RE SUIT OF JAMES TALCOTT INC., V. VENDING UNLIMITED INC., ETC.

The Trustee accepts the claim of 35 hours spent by Mr. Hahn and 96 hours spent by Mr. Ryan which are supported by testimony - pages 1018 - 1019, and the affidavit of Mr. Ryan, Exhibit ZZZZ.

XIV - SATISFACTION OF LIEN

The Trustee accepts the 50 hours spent by Mr. Hahn in this connection and they are allowed because they are supported by testimony - pages 669 - 688.

XV - PROCEEDING BY AUTOMATIC CANTEEN

The Trustee accepts the 40 hours spent by Mr. Hahn and the 250 hours spent by Mr. Abeson as reflected in his affidavit claims - Exhibit A-5. This time is allowed in reliance on testimony at pages 812 - 826.

XVI - SERVICES RE EXAMINATION OF TALCOTT'S OFFICERS IN MASS ACTION BROUGHT BY TRUSTEE.

Mr. Hahn claims 60 hours all of which the Trustee rejects. I allow this time which is supported by testimony at pages 611 - 638 because again it brings into play the clear language of the loan agreement "in the prosecution or defense of any action or proceeding either against you or against the undersigned concerning any matter growing out or in connection with this agreement".

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XVII - ACTIONS BY AND AGAINST GENERAL ELECTRIC CREDIT CORPORATION.

The Trustee accepts the 35 hours spent by Mr. Hahn and the 225 hours spent by Mr. Ryan as reflected in claimant's Exhibit ZZZZ. This time is allowed in reliance on testimony pages 1019 - 1020.

XVIII - SERVICES RE TRUSTEE'S SALE OF REMAINING PHYSICAL ASSETS, PATENTS, TRADEMARKS AND GOODWILL OF DEBTORS TO THE VENDOR COMPANY.

Mr. Hahn claims 40 hours all of which the Trustee rejects on the grounds that work performed in connection with the sale of assets is not reimbursable. I allow these 40 hours which are supported by testimony pages 639 - 660. The Trustee had negotiated for the sale of their remaining assets. They properly consulted with Talcott. When application was made to the Court for approval, notice was given to all interested parties and because of the loan agreement Talcott received notice. Talcott with the assistance of its attorneys in the interim arranged for a sale to a different party on far better terms than those offered by the purchaser whom the Trustee had produced and eventually the deal arranged by Talcott with Vendor was approved by the Trustee and by the Court to the great benefit of the debtors.

XIX - THE REPAYMENT BY TRUSTEE TO TALCOTT OF LOAN MADE PURSUANT TO ORDER OF DECEMBER 4, 1963.

Mr. Hahn claims 6 hours but the Trustee rejects this on the ground that this loan is beyond the terms of the financing

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agreement. I allow the 6 hours. The time is supported by testimony - pages 1727 - 1732. It is true that this loan was not subject to the terms of the loan agreement directly. However, the loan was one made in order to continue survival of the debtors and therefore protect security held by Talcott from deterioration. The services were part of the enforcement of the loan agreement.

XX - MISCELLANEOUS SERVICES

Mr. Hahn claims 335 hours in reviewing various petitions, reports, conferences with Talcott's personnel and other services. The Trustee rejects all of this claim because as it says it involves only benefits to Talcott and because the reconstruction of the time records were not convincing. Testimony regarding these hours appears at pages 992 - 1043. I believe the claimant in this instance must be penalized for not keeping concurrent and accurate time records and I allow 175 hours. The services rendered were part and parcel of these many difficult, complicated and intricate transactions dealing with enforcement of the loan agreement.

SUPPLEMENTAL AFFIDAVIT I

DISTRIBUTION OF ROUTES PROCEEDS AS INDICATED IN V ABOVE.

Mr. Abeson's affidavit Exhibit A-5 indicates he spent 200 hours. Mr. Hahn does not indicate the time he spent. The Trustee allows 100 hours for Mr. Abeson. I allow 100 hours.

SUPPLEMENTAL AFFIDAVIT II

ATTORNEY'S FEES RE THE HAMMOND ROUTE.

The Trustee allows 75 hours for Mr. Abeson which I adopt.

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SUPPLEMENTAL AFFIDAVIT III

OBJECTION TO CONFIRMATION OF TRUSTEE'S PLAN.

Mr. Hahn claims 151 hours and Mr. Abeson 579 hours. The Trustee rejects both claims and points out that Talcott objected to the Trustee's plan which was approved by the creditors and debenture holders and was confirmed. The claim in my judgment is allowable both as to Mr. Hahn's 151 hours and Mr. Abeson's 579 hours which are supported by testimony at pages 865 - 937. The eventual plan adopted materially affects the value of the notes held by Talcott. Thus Talcott by litigating what the terms of the plan of reorganization should be was taking legal steps directly related to enforcement of Talcott's notes. In ultimate effect it seems that Talcott's action was comparable to suing on the notes and had it been able to do so it certainly would have been entitled to recover the face amount of the notes plus counsel fees in accordance with the terms of the loan agreement. The Trustee suggests that allowance of this item would involve payment of \$66,000 for legal services rendered to Talcott in objecting to the plan. My calculations do not so indicate. Since this item involves collection services, the doctrine of strict economy would be applicable and Mr. Hahn's services could not bring more than \$50 per hour and Mr. Abeson's \$25 per hour. The charge therefore for this item would approximate \$9,000.

SUPPLEMENTAL AFFIDAVIT IV

APPLICATION FOR PAYMENT OF TRUSTEE'S CERTIFICATES

Mr. Hahn claims 52 1/2 hours and Mr. Abeson 1,199 hours. All of which is rejected by the Trustee. I allow Mr. Hahn 52 1/2 hours and Mr. Abeson 600 hours. It is difficult to perceive how the enforcement of certificates should be as time consuming as it is claimed it was, the testimony appearing at pages 937 - 978 notwithstanding. As to whether this item is reimbursable, it clearly appears that this loan to Apco guaranteed by the certificates of the conservator, was made pursuant to the financing agreement and Talcott's application was one designed to "enforce payment . . . of any obligation" in the language of the agreement. Again applying the rule of strict economy these services involve a fee of \$17,500 not \$97,000 as the Trustee suggests.

TIME RECORDS

Although the failure of an attorney in a reorganization proceeding to keep accurate and simultaneous records of the time he devotes to the matter is frowned on

Hudson v. Manhattan R. E. Co.
339 F. 2d 114 CA 2 1964

that does not mean that such attorney may not recover anything for his services. In

In Re Nazareth Fair Grounds
374 F. 2d 595 CA 2 1967

the Court said at page 598:

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"We did not mean to imply by anything we said in Hudson v. Manhattan (339 F. 2d) that the failure to keep complete records for all the work an attorney does should result in a total disallowance of any claim for services; we merely meant that the failure to keep current and accurate records from day to day is a factor to be considered in evaluating the services and in accepting the estimates which the attorney makes at some later date merely on his own recollection at a time when he is looking forward to compensation. Thus the district court erroneously and unjustifiably applied H & M to Rosen's application in holding that no allowance should be made to him".

In

In Re Jack Borgenicht
470 F. 2d 283 CA 2 1972

where it appeared that the claimant could "substantially reconstruct accurate time records" from documents and memoranda the case was remanded for

"submission of such records and reconsideration of the award upon the fuller record".

Talcott's attorneys herein have put in evidence a mass of documents including many "Memorandum to the file" which give complete and reliable support to the reconstruction of the time records.

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THE RATE OF COMPENSATION

In

In Re Continental Vending
318 F. Supp. 421

Chief Judge Mishler at page 427 set forth hourly rates for attorneys which I consider the rule of the case for fixing a base and beginning for computing attorney's fees herein. I apply this rule as follows:

Hahn	1299 1/2 hrs.	at	\$50	\$64,975
Ryan	321 hrs.	at	35	11,235
Abeson	1760 hrs.	at	25	44,000
Novick	237 hrs.	at	25	5,925
Associates	45 hrs.	at	25	1,115
				<u>\$127,250</u>

Being mindful of the words of the order of referral herein which directed that consideration be given to "all relevant factors . . . the novelty or complexity of the factual or legal issues, the importance of the services to the estate and the benefit derived by the estate from those services", I am constrained to fix the reasonable attorney's fees recoverable by Talcott at more than the \$127,250 arrived at by applying the base hourly rate indicated above.

That Mr. Hahn's services repeatedly rescued the debtors from total ruination has been demonstrated above. The complexities and intricacies of the questions with which he had to deal are equally apparent. The Silco transaction alone involving a sale for \$2,820,00 and complicated corporate and financing arrangements

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itself alone was a masterful stroke and this and others were of the greatest benefit to the debtors. The sums of money involved were very large.

Concededly we cannot invoke the rule used at times in stockholders suits, of doubling the basic award

Glasson v. Colorado Interstate Corp.

Latchum CJ - Dist. Del. Mar. 7, 1975

commented on on front page of New York

Law Journal March 13, 1975

or of adding 50% as was done by Judge Weinfeld in the Southern District of New York in

Blank v. Talley Industries

January 14, 1975

as reported on the front page of the New York Law Journal, January 15, 1975.

In

In Re Webb & Knapp

363 F. Supp. 423

S. D. N. Y. 1973

Judge Ward, over SEC objection, awarded counsel fees of \$790,000 in addition to \$460,000 already paid to counsel for a Trustee and commented on the complications involved in the sale of assets, prosecution of claims against third parties and settlement of claims all the work of the Trustee's attorneys and the substantial benefits the estate derived therefrom.

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As Judge Tyler of the Southern District of New York
said in

In Re Yale Express
281 F. 76

in commenting on an earlier unreported decision in that case which
had allowed commercial rates of payment to the attorney for a
lender to the bankrupt at p.81:

" . . . although it may be that certain language in
that opinion could be construed to support Cadwalader's argument,
I am constrained to conclude that the question presented in that
case was materially different than the one presented here. A
major lynchpin in the December 30, 1966 decision was the fact that
the previous trustee in reorganization, in order to induce the
Chase Manhattan Bank to purchase a major quantity of trustee
certificates in these proceedings, made an agreement with that
bank to pay its counsel fees incident to the purchase transaction
from assets of the debtors. Moreover, the legal fees paid to
counsel for the Chase Manhattan Bank were nominal in comparison
to the substantial benefits conferred upon the debtors in the
form of cash at a time when it was desperately needed."

It is my considered opinion and judgement based on all
of the facts adduced before me that a reasonable fee for the
services of Talcott's attorneys was the sum of \$150,000. In
arriving at this conclusion I have taken into account not only
the quality of the services rendered, the difficulty of the

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questions involved, the benefit to the estate and the professional standing of Talcott's attorneys, J. Jacob Hahn, senior partner in Hahn, Hessen, Margolis and Ryan, 350 Fifth Avenue, New York City, The Empire State Building. He and his firm are rated AV the highest rating obtainable in Martindale Hubbell. Mr. Hahn was admitted to practice in 1924. The reported decisions reflect that Mr. Hahn's firm for many years has been and presently it is active in most branches of the law including bankruptcy.

THE CLAIM FOR AUDITING COLLECTION AND MISCELLANEOUS CHARGES

The claim for this item has been revised downward by the claimant to \$95,645.38 of which the Trustee concedes \$57,163.79 and contests \$38,481.59. Again the full amount has been paid by Talcott who seeks reimbursement. The affidavit of George Fairberg, Vice President of Talcott with schedules A & B attached forms the claim as to this charge and offered in support is the testimony of Fred Goldberger (1076 - 1136), who from 1961 thru 1967 was head of Talcott's analytical and auditing department but who now is Executive Vice President of Odyssey Inc., of Evanstown, Illinois, the testimony of Mark Rosenbaum (1139 - 1228) Assistant Vice President of Talcott, the testimony of George Fairberg (1234 - 1263) Senior Vice President in the Special Loan Division of James Talcott and the affidavit of Joseph Brady (Claimant's Exhibit L-5).

The Trustee objects to items in Schedule A of Mr. Fairberg's affidavit numbered 29, 35 and 54 as well as a number of items labelled "Reimbursement of legal disbursements" of Mr. Hahn's

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firm totaling \$5,271.54. Even though these disbursements have not been substantiated by documentary proof, I believe that the sworn testimony and affidavits of reputable attorneys that the disbursements were a necessary incident to their professional services must be accepted until the contrary is proved.

As to the other items the Trustee does not dispute the time claimed or the rates charged which are fully substantiated but it says:

"The Trustee's objection is based principally upon the grounds that the work performed by these individuals (Talcott's auditors) was merely in the nature of reviewing the work done by the Credit Department and other employees of Continental and Apco during the Trusteeship".

Throughout the submitting of testimony before me, the Trustee had assisting his counsel Mr. Lawrence Ferber an accountant and auditor, now employed by the Trustee but who has served Continental and its subsidiaries in the same capacity since 1958. He was called to the stand by the claimant and he testified:

"I was the comptroller of the Miami Division and the subsidiary prior to its becoming so. When I was transferred to New York, I -- what I call the wild days of 1963 -- we picked up duties as we went along".

and at p. 1463 Mr. Ferber said:

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"Mr. Hahn, back in 1963, I don't know the exact number of accountants and bookkeepers and various individuals that we had employed there".

It is a fair conclusion that as so often happens, when the debtors filed petitions for reorganization their work staffs rushed away to seek security of employment elsewhere.

Mr. Fairberg testified as to Talcott's accounts with the debtors as of January 1, 1964 at p. 1238.

"So, to summarize what I just said, there was about four million dollars in open accounts receivable and another half a million dollars added to that, so that is four and a half million dollars and a million and a half of conditional sales contracts making it a total aggregate amount of six million dollars".

In addition to this Talcott had a security interest in Thousands of machines which had been sold to route operators (1240).

Mr. Fairberg further testified as to defaults of receivables and conditional sales paper late in 1963 as follows at p. 1242:

"Well, as is going to happen when a client gets into financial difficulties, particularly where there is published reports of bankruptcy, or insolvency proceedings, the contract obligors and the accounts receivable obligors find reasons not to pay and there is a very fast deterioration of the accounts receivable and that was one of the reasons that prompted

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our management to take the accounts receivables out of the normal commercial finance section and to put them into the loan section where we had experienced collectors and people who could liquidate collateral.

I would estimate that half or I should say fifty percent of the total amount of the receivables had a delinquency to them.

Q That would be what, in what dollar amount?

A Three million dollars."

From the foregoing it becomes apparent that Talcott had to step in and audit the debtors' accounts and check numbers on collateralized machines, machines returned to the debtors and machines stored in warehouses in various part of the country (1081 - 1092) as part of its enforcement of debts owing to it arising out of the loan agreement. I find these charges proper and reasonable and I allow them to the full extent of \$95,645.33.

ATTORNEY'S DISBURSEMENTS - SCHEDULE E OF CLAIM

The claimant withdraws from consideration at this time, the disbursements referred to in this schedule. (Br. 29)

Other disbursements claimed for Talcott's attorneys are conceded by the Trustee and are allowed in the sum of \$3,231.59. (Br. p. 37)

QUESTIONS RESERVED FOR LATER DETERMINATION

Legal Disbursements of \$6,544.08 (Exhibit E attached to Mr. Fairberg's affidavit in this claim) are contested by the

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Trustee but the claimant says "the propriety of these disbursements cannot and should not now be determined" (Br. 29). Likewise the claimant withdraws from consideration at this time the bill for professional services rendered from January 1, 1968 to December 31, 1973, in the sum of \$60,000 and dated January 4, 1974 which is attached to the affidavit of Mr. Fairberg in the claim.

As to the separation of those charges payable by Continental from those payable by Apco, the claimant points out that an appeal from the order confirming a plan of reorganization is pending and "the question of allocation should await determination of the appeal". (Br. 31)

CONCLUSION *

I find and respectfully report that the reasonable value of the services of the attorneys for Talcott for which claim is made herein was the sum of \$150,000 and that in addition the claimant is entitled to recover \$95,645.38 for Auditing Collection and Miscellaneous Charges plus disbursements of Talcott's attorney as conceded by the Trustee in the sum of \$3,231.59.

* I have not been favored by either the claimant or the Trustee with proposed findings of fact and conclusions but I have incorporated in the foregoing recitations my findings particularly where I tabulate and discuss the twenty captions in Mr. Hahn's affidavit and the four supplemental affidavits and in my discussions of the fee allowable and the rate per hour. Should it be deemed necessary that I make formal and separately numbered findings of fact and conclusions I readily will comply upon receipt from the parties of their proposals in that regard.

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Bankruptcy proceedings for the debtors Continental Vending Machine Corporation (Continental) and Continental Apco Corporation (Apco) have been pending in this court since 1963. James Talcott, Inc. (Talcott), a creditor of Continental and Apco prior to 1963, made loans to the debtors during the pendency of the bankruptcy proceedings; in turn, the conservator and later the trustee, issued certificates to Talcott guaranteeing repayment. In 1973, Talcott moved this court to order the trustee to make repayment on these certificates. The trustee contested Talcott's right to repayment and cross-moved for an accounting by Talcott; this motion was granted, and when Talcott filed the accounting, it included claims against the debtors' estate for attorney's fees, costs and disbursements. Since the trustee objected to the fee claims, this court directed Magistrate Catoggio, acting as Special Master, to take testimony and make findings on the issue of Talcott's attorney's fees and the extent to which these fees were properly compensable from the debtors' estates. Talcott now moves this court to confirm the report of Magistrate Catoggio which found that Talcott was entitled to a reimbursement of \$248,876.97 for attorney's fees and disbursements.

DISCUSSION

The fixing of allowances for attorney's fees was termed "the most thankless and delicate task in all of the

problems of judicial reorganization," Finn v. Childs, 181 F.2d 431, 435 (2d Cir. 1950), quoting Judge Frank; the Second Circuit Court of Appeals went on to say that the district court should avoid "vicarious generosity" in fixing allowances since the fees will lessen the value of ". . . the debtor's estate which may belong, in equity, largely to others than those who have requested their [attorneys'] services." Finn v. Childs, supra, at 435.

The statutory basis for the award of fees for creditors' attorneys is found in Section 243 of the Bankruptcy Act, 11 U.S.C. §643.^{/1}

^{/1} Section 243 of the Bankruptcy Act, 11 U.S.C. §643, provides:

The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contribute to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.

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This section authorizes the district judge to allow reasonable compensation to creditors' lawyers for services performed and costs and expenses incidental thereto for only four areas:

- (1) "in connection with the submission by them of suggestions for a plan, or"
- (2) "of proposals in the form of plans, or"
- (3) "in connection with objections by them to the confirmation of a plan, or"
- (4) "in connection with the administration of the estate."^{/2}

In the instant case, the master factoring and financing agreements between the debtor Continental and Talcott contained a clause obligating Continental to repay Talcott "a reasonable allowance for attorneys fees" incurred due to Continental's breach of the agreement.^{/3} Talcott argues that the court's discretion to award fees is controlled only by the contours of this clause which, it is argued,

... covers collection of the indebtedness in every possible way, without limitation, by legal action or without legal action. It includes every necessary or proper step "to obtain or enforce payment." Implicit in the language is protection and preservation of the collateral and certainly its liquidation.^{/4}

^{/2}11 U.S.C. §643.

^{/3}The text of the entire clause, set forth in the March 14, 1973 affidavit of J. Jacob Hahn, one of Talcott's attorneys, is as follows:

"In the event of any breach by the undersigned of any provision of this agreement and/or upon the termination of this agreement the undersigned will repay upon demand all obligations to you of the undersigned and in addition there-
to all costs and expenses incurred, including a reasonable allowance for attorneys fees, to obtain or enforce payment of any receivable assigned, or of any obligation of the undersigned to you, or in the prosecution or defense of any action or proceeding either against you or against the undersigned concerning any matter growing out of or connected with this agreement and/or the receivables assigned or of any obligations of the undersigned to you."
Affidavit at p. 2, emphasis supplied.

^{/4} Talcott's Memorandum in Support of Its Proof of Claim at 2.

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However, the authority of the district court is not expanded "...merely because the contract [between creditor and debtor] calls for a payment of attorney's fees," In re Intaco Puerto Rico, Inc., 357 F.Supp. 1122, 1125 (D.P.R. 1973), or includes broad language which may be construed to authorize such, In re General Stores Corp., 278 F. 2d 437 (2d Cir.1960). Rather, the agreements provide only the basis for awarding counsel fees, costs and expenses under the statute,¹⁵ Ruskin v. Griffiths, 269 F.2d 827, 829, 833 (2d Cir.1959). This writer presided over and is familiar with, the multifarious proceedings since the filing of the involuntary petition against Continental on July 5, 1963, and is aware of those services rendered by Talcott in the proceedings for which reimbursement is claimed. In re Wingreen Co., 452 F.2d 637 (5th Cir.1971), Gochenour v. Cleveland Terminals Bldg. Co., 142 F.2d 991, 995 (6th Cir.), cert. denied, 323 U.S.767, 65 S.Ct. 120 (1944). Nevertheless, the broad discretion vested in this court to charge attorney's fees to the debtors' estate is circumscribed by §243 of the Act. In re Chicago and West Towns Rys., 230 F.2d 364, 368 (7th Cir.) cert. denied, 351 U.S.943, 76 S.Ct. 837 (1956); Delafield, Marsh & Hope v. Silbiger, 228 F.2d 838, 841 (2d Cir.1956).

¹⁵Talcott further analogizes its position in claiming fees to that of the trustee on a deed of trust securing a loan in Brown v. Security Nat'l Bank, 200 F.2d 405 (4th Cir.1952). This analogy is unpersuasive since the language in the clause at issue in Brown provided for indemnification by the debtor of all expenses "including any and all attorney's fees incurred," 200 F.2d at 406, and since the fees for which the trustee in Brown sought an allowance were for services directly related to the collateral covered by the deed of trust. In any case, the better view is that contractually-based attorney's fees "...serve only as a maximum limit of the reasonable fee which is to be determined by the bankruptcy court." In re Intaco Puerto Rico Inc., supra.

Under §243, fees for services rendered by attorneys for creditors, including costs and expenses, are payable from the debtors estate "... only if their services contributed to the confirmation or defeat of a plan or were beneficial in the administration of the estate." In re Porto Rican Am. Tobacco Co., 117 F.2d 599, 601 (2d Cir.1941). The claimant has the burden of establishing his entitlement to fees, Gochenour v. Cleveland Terminals Bldg. Co., supra, 142 F.2d at 995; In re De Luxe Court Apartments, 86 F.2d 772 (7th Cir.1936); National City Bank of New York v. Saldana Crosas Realty Corp., 86 F.2d 923, 924 (1st Cir.1936); In re Yale Express Sys., Inc., 366 F.Supp.1376 (S.D.N.Y.1973). The proof adduced by the claimant must be two-fold: it must establish the number of hours spent in performing legal services, and it must support the claimant's contention that the legal work is compensable under §243.

The court expects accurate and contemporaneous time records in support of the claim; time estimates made long after actual performance of the work do not provide the court with an adequate basis for awarding attorney's fees. In re Borgenicht, 470 F.2d 283 (2d Cir.1972); In re Hudson & Manhattan R.R.Co., 339 F.2d 114, 115 (2d Cir.1964); In re Webb & Knapp, Inc., 363 F. Supp. 423 (S.D.N.Y.1973); In re Polycast Corp., 289 F. Supp. 712, 717 (D.Conn.1968). The absence of time records in this matter is of particular significance since Talcott's attorneys specialize in commercial law and bankruptcy and should have been aware

of the Second Circuit's position, as announced in In re Hudson & Manhattan R.R. Co., Supra, "that any attorney who hopes to obtain an allowance from the court should keep accurate records of work done and time spent."¹⁶

The court is also obliged to carefully scrutinize the nature of the services claimed. The principal test in determining whether the services are compensable is whether they are necessary and directly benefit the estate. Ruskin v. Griffiths, supra, 269 F.2d at 834. Thus, an attorney cannot be compensated for services rendered the estate where its interests were otherwise adequately represented, Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 266 F.2d 862 (2d Cir.) cert. denied, 361 U.S. 862 80 S.Ct. 120 (1959), In re Paramount Publix Corp., 85 F.2d 588 (2d Cir.1936), cert. denied, sub nom Palmer v. Paramount Pictures, 300 U.S. 655, 57 S.Ct. 432 (1937), Finn v. Childs, supra, 181 F.2d at 436; or for time spent in preparing applications for a fee, In re Delta Food Processing Corp., 374 F. Supp. 76, 83 (N.D.Miss.1974); or in representing interests in conflict with the interests of the debtor, Carey v. Selected Investments Corp., 319 F.2d 578 (10th Cir.1963).

The creditor's attorney may be compensated for services performed prior to the filing of the petition if the services relate directly to matters in connection with the reorganization of the debtor, Gochenour v. Cleveland Terminals Bldg. Co., supra, at 996, or in connection with services rendered for collection of the debtors obligation or the preservation and/or

¹⁶Talcott's law firm, Hahn, Hessen, Margolis & Ryan, was cited by the Court of Appeals in In re Borgenicht, supra, for "failure... to keep proper records."

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protection of the debtors estate. John Hancock Mutual Life Ins. Co. v. Carey, 155 F.2d 229 (1st Cir. 1946). Conversely, an award of attorney's fees may not be made for services not directly connected to the reorganization of the debtor or to the administration of the estate. Finn v. Childs, supra, 142 F.2d at 439.

Talcott's attorney's services in opposing a plan that was adopted are not compensable. In re Nine North Church St., 89 F.2d 13, 15 (2d Cir. 1937), In re National Radiator Co., 29 F. Supp. 804 (W.D. Pa. 1939). The attorneys represented Talcott's interests in seeking a preferential classification in its opposition to the plan. The obligation to pay for such services is Talcott's and not the debtors, Carey v. Selected Investments Corp., supra.

The court has considered the trustee's objections to the Master's report in arriving at its decision awarding attorney's fees. The claims for fee reimbursements will be referred to below by the paragraph numbers in the supporting affidavits of J. Jacob Hahn, one of Talcott's attorneys. ¹⁷

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The affidavit of J. Jacob Hahn, verified March 14, 1973, contains 168 paragraphs (together with exhibits). The services are described in paragraphs numbered 6 to 167 inclusive. Hahn also submitted a supplemental affidavit dated March 16, 1973.

AFFIDAVIT OF MARCH 14, 1973

PARAGRAPHS 6-60: CLAIM FOR SERVICES PRIOR TO THE FILING OF
PETITION FOR REORGANIZATION UNDER CHAPTER X

Paragraph 6 described the retainer by Talcott of Hahn's law firm "... to act as its counsel in respect of all matters directly or indirectly affecting Talcott in its relationships with Continental and its subsidiaries ..." for the protection of Talcott's interests in the proceeding instituted in the United States District Court for the Southern District of New York by the Securities & Exchange Commission against Continental. The court appointed a Conservator in that proceeding and the Conservator retained counsel. The succeeding paragraphs 7 to 12 recount conferences with the Securities & Exchange Commission, the court, the Conservator, Franklin National Bank and Meadowbrook Bank concerning the financing of Continental, support of Continental's Board of Directors, the decision to withdraw support and urge the appointment of a receiver; and like services in pursuance of Talcott's retainer. Paragraph 13 states that Hahn took exception to a proposed restraining order in that proceeding "... which might have been construed as a restraint of Talcott's right of enforcement ..." The court deleted this provision from the order.¹⁸ Similarly, paragraphs 14 to 25 describe the efforts to

¹⁸ The Securities & Exchange Commission submitted an order staying the institution or continuation of any action against Continental and against Apco. Hahn testified that he was concerned about Talcott's rights under the proposed order. He testified:

"I was concerned about that, yes, because that affected my client's rights, but I was also concerned about the Conservator to be in a position to operate these routes without molestation by law suits which had been instituted and would be instituted. [Protecting Talcott's rights]...is the only thing I really was primarily interested in." (Tr.pp. 89-90)

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keep Continental afloat by seeking offers to purchase some of its assets, and success in obtaining authorization from the court to permit Continental to borrow \$300,000 from Talcott. These services were not in any way part of any plan of reorganization under Chapter X or of the administration of the debtor's estate. The trustee's objection to compensation for services set forth in paragraphs 6 to 25 is sustained.

Paragraph 26 alleges services rendered in connection with the sale of Continental's New Jersey vending routes to American News Company; the court finds that some of these services are chargeable to the estate as costs of collection. Problems were presented in identifying vending machines on the New Jersey route. The proceeds of the sale, i.e., approximately \$225,000^{/9} were placed in an escrow account; they represented cigarette vending machines placed in various public places as part of the New Jersey route. When the Chapter X petition was filed in this court on July 5, 1963, the escrow fund came under the jurisdiction of the United States District Court for the Eastern District of New York. National Equipment Rental Company claimed a prior lien in the escrow fund^{/10} to the extent of about

^{/9} This sum was later increased by the proceeds of the sale of the New York route (Tr. p. 208).

^{/10} The proceeds of the sale replaced the assets of the New Jersey routes and the rights of the lienors were transferred to the fund.

\$150,000; in addition, six other creditors claimed a lien in the escrow fund, and Talcott's claim for specific liens against the New Jersey route exceeded \$160,000 (Tr.pp. 178-9). This court referred the issues thus raised with respect to the escrow fund to Bankruptcy Judge Joseph V. Costa. Hearings were held before Judge Costa on May 25, 1964, June 22, 1964, July 20, 1964, July 23, 1964, October 5, 1964 and November 9, 1964.^{/11} The transcripts of the hearings consist of approximately 1,000 pages. Ultimately, the fund was distributed pursuant to a settlement reached by all the parties. Hahn claims 160 hours of time spent on the matter (Paragraphs 29 to 38), in addition to the time spent prior to the filing of the Chapter X petition (Paragraph 25). The trustee urges that 99 hours, plus 5 hours for the work under Paragraph 26, is fair. The trustee argues that much of the work is non-legal. The services rendered appear to be beyond the authority granted by contract, i.e., to enforce payment of any obligation of the debtor or in the prosecution or defense of any action or proceeding "concerning any matter growing out of or connected with [the financing] agreement." However, the court finds the services compensable to the extent that Hahn succeeded in disposing of various liens against the fund and brought to a satisfactory conclusion the lien claim of National Equipment

^{/11}

Apparently, there were additional appearances (Tr. pp. 229-233).

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Rental Company. Since no recording was made of the hours spent or the specific nature of the services rendered, the court must estimate the same. The court finds that Hahn spent approximately 40 hours in the hearings before Judge Costa; that he (or his associates) spent an additional 50 hours in the preparation of trial pleadings, affidavits and documents, and that Hahn spent an additional 25 hours in various negotiations and conferences in the disposition of liens affecting the sale of the New Jersey routes and in satisfying various liens against the escrow fund.

I therefore find that Talcott is entitled to an allowance for services rendered by Hahn as described in paragraphs numbered 26 and 29 to 38, for 115 hours. ^{/12}

Paragraphs 39 to 48 of the Hahn affidavit outline Continental's difficulty in continuing the business of manufacturing vending machines in its financial condition (without working capital, and without borrowing power), and the performance of legal services in connection with a loan made by Talcott to Continental and Apco of \$650,000 conditioned on an authorization from the court to sell the remainder of the debtor's vending routes. A conference at this writer's chambers was held on

^{/12}

A table summarizing the hours of attorney's fees for each paragraph of the Hahn affidavit as claimed by Talcott, as conceded by the trustee, as found by the Magistrate and as awarded by this court is included as an appendix to this Memorandum. A table setting out the dollar amounts that these various fee claims represent is also included.

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August 14, 1963. A loan agreement providing that Talcott would lend the debtor \$650,000 was signed on August 14, 1963, and the trustee agreed to seek authorization for the sale of the remaining six vending routes. The court recognizes that this agreement helped to preserve Continental as a viable business enterprise for purposes of sale as a going business. Hahn's affidavit also shows how he insisted that the trustee meet various conditions to protect Talcott's interest in the prior and new indebtedness, and describes how the Kelsey Hayes Company offered to buy Continental's manufacturing plant and business.

During these transactions, Hahn's representation was solely as Talcott's lawyer; the trustee and his counsel represented the debtor. The mere fact that the debtor benefited from the loan is an insufficient reason for granting legal fees to the creditor. The services rendered in procuring the loan cannot be considered as services enforcing payment (as found by the Master). The loan agreements did nothing more than increase the debtor's obligation and further secure Talcott. Therefore, the trustee's objection is sustained.

PARAGRAPHS 49-60

In accordance with the August 14, 1963 agreement, the trustee moved by order to show cause dated August 14, 1963, for authority to sell the vending routes. An order dated August 16, 1963 (resettled September 3, 1963) provided for the sale of the

routes. The minimum sale price for the three routes known as the Santa Ana, San Francisco and Buffalo routes, was fixed at \$2,850,000 (the order also authorized the sale of the routes known as the Detroit, Michigan, Hammond, Indiana, and St. Louis, Missouri routes). Hahn testified that Talcott was interested in consummating the sale of the Santa Ana, San Francisco and Buffalo routes to the prospective purchase, Silco, and that Talcott was prepared to purchase the routes if Silco faltered or refused to consummate the deal and had therefore authorized a corporation known as Dana Vending Corporation, which corporation would purchase the routes if Silco did not. Talcott had an alternative plan to use Dana Vending Corporation as a conduit for the sale of the routes to Silco. The claim in paragraph 49, as supported by Hahn's testimony (Tr.pp. 369-374), seeks reimbursement for services rendered to Talcott and Silco during the negotiations for the three routes, relating to Talcott's plans for the takeover through Dana, the negotiations with Silco and the drafting of offers to purchase. However, these services were performed by Hahn pursuant to the Talcott retainer, and the trustee was represented through by able counsel. The objection of the trustee to the claim in paragraph 49 is sustained.

Paragraph 50 seeks reimbursement for attending the public sale of the Santa Ana, San Francisco and Buffalo routes. Dana Vending Corporation's offer of \$2,850,000 was the only offer,

and it was approved by the court. Hahn represented Dana (Tr.p.376). Talcott then transferred its right in the successful bid to Silco and arranged the necessary financing. It is clear that Hahn represented Talcott in this transaction. To the extent that the successful bid helped the trustee liquidate an asset, it was a benefit to the estate; however, the fact that the services culminate in an indirect benefit to the estate does not warrant compensation.^{/13} The trustee's objection is upheld.

Talcott failed to offer any proof of any services rendered in relation to the sale of the Hammond, Indiana route, as claimed in paragraph 51.^{/14} The trustee's objection is sustained.

Paragraph 52 claims reimbursement for legal services for attempting to negotiate a private sale of the Detroit and

^{/13} The claim includes services in the transaction between Talcott and Silco and the closing involving 21 items encompassing the conditions of the loan from Talcott to Silco in the amount of more than \$3,000,000 (Tr.pp.377-378, 381-387).

^{/14} The Master found that the sale of the routes "...required close scrutiny by Talcott's attorneys because security held by Talcott was involved in each and every transaction" Master's report, p.23. However, none of the services rendered in connection with the sale were for the purpose of either protecting the security or enforcing collection of the obligations. The services, i.e., aiding the liquidation of assets, were incidental and performed by Hahn while representing Talcott's interest.

St. Louis routes. ^{/15} The trustee's objection is sustained.

Paragraph 53 refers to an offer of \$35,000 from one Howard Bressack to purchase the Pittsburgh route. Talcott does not argue that it procured the purchaser (Tr.p.378); but it claims reimbursement for Hahn's consultation with Talcott concerning the offer, Hahn's advice to the trustee that Talcott would not oppose the sale, and Hahn's presence in court on February 26, 1964, when the offer was approved. These services were rendered to Talcott, ^{/16} and not to the debtor. The objection of the trustee is sustained.

Paragraphs 54 and 55 relate to the public sale of the Detroit and St.Louis routes on September 30, 1963. The only significant service rendered by Hahn was not to oppose the sales. The trustee's objection is sustained.

Paragraph 56 to 58 inclusive, relates to a meeting between the trustee, representatives of Talcott, trustee's counsel

^{/15}

The Detroit and St.Louis routes were offered at the public sale of September 9, 1963. The court adjourned the sale to September 27, 1963, when no offer equaling the upset price set forth in the conditions of the order of August 14, 1963 was made.

^{/16}

Thus, when the trustee's counsel questioned Hahn during the hearing as to why Hahn felt it necessary to appear personally instead of assigning a junior, he testified "...this was my client's request. I delegated matters where I didn't think my client would care one way or another."

and Hahn to discuss a variety of matters. Hahn testified to the execution of trustee's certificates for a \$2000,000 advance on the loan of \$650,000, reaching agreement on the amount due on a real estate mortgage on property involved in the sale of the Detroit route, making arrangements for payment of the mortgage from the proceeds of the sale and for Talcott's control of vending machines returned or traded for new machines as part of the loan agreement with Continental and Apco (Tr.pp.391-393). Throughout these transactions, Hahn represented Talcott and not the debtor. The time was not spent to either protect or preserve the debtor's assets. The trustee's objection is sustained.

Hahn conceded at the hearing that the services claimed under paragraph 59 were claimed under other paragraphs (Tr.p.395).

Paragraph 60 deals with forms of assignment required by the Chemical Bank in the financing arrangement entered into between Talcott, Continental and Apco. Loans advanced by Talcott to finance purchases of Continental's vending machines (through Apco) would be assigned to the Chemical Bank. Hahn testified he spent four hours in this work. I award Talcott reimbursement for four hours.

PARAGRAPHS 61-74

Paragraphs 61 to 74 describe in great detail negotiations for a \$750,000 loan, application to the court for authorization, hearings on the petition for authorization, this

court's order of authorization of December 4, 1963, and the appeal from the order. All the legal services performed on behalf of the trustee were performed by the trustee's counsel and not Hahn. Hahn negotiated for Talcott. Discussions revolved about the possibility that Talcott, together with Franklin National Bank and Meadowbrook National Bank, would join in making the loan (both Franklin and Meadowbrook were large creditors). Talcott's Executive Committee approved the loan in the amount of \$750,000 upon a number of conditions. (Par. 63 Hahn aff.p.35). One of the conditions was that "the trustee would execute and deliver to Talcott and its participants a general and complete release in behalf of both debtors [Continental and Apco]." The terms and conditions of the loan were discussed with the court. The court was advised that the trustees intended to commence an action against approximately 58 defendants, including Talcott, Franklin and Meadowbrook. The claim against Talcott was based on Continental's dealing with one Barash who "had been the loan officer in charge of the Continental account." The trustees represented that they had evidence that Harold Roth, president of Continental, had factored fictitious accounts receivable with Talcott, with Barash's knowledge and cooperation and that Barash had received payments from Roth for his part in the illegal scheme. When the loan was consummated, Franklin participated to the extent of \$250,000 and Talcott loaned the balance of \$500,000.

Both Talcott and Franklin received general releases. ^{/17} The Master awarded Talcott 93 hours in connection with these transactions because "...but for this loan the debtors would have collapsed entirely and the security held by Talcott would have depreciated markedly" (Master's report p.24). However, the trustee was adequately represented in this loan transaction, and Hahn's services were rendered to Talcott. Talcott (and Franklin) obviously benefited from making the loan. It is also clear that it was to Talcott's benefit that Continental remain afloat. It follows that the benefits to Continental from Hahn's services were indirect - that they may have been substantial is irrelevant. The court sustains the trustee's objection.

PARAGRAPHS 75-84

The trustee agrees that the services rendered by Hahn as claimed in Paragraphs 75 to 84 were to enforce collection of the debtor's assets and aid in the administration of the estate as authorized by the financing and factoring agreements. Therefore, these services are reimbursable under Section 243 of the Act, and the Master's findings of a total of 81 hours is confirmed.

^{/17}

Meadowbrook refused to participate in the loan. Meadowbrook was joined as a party defendant (Wharton v. Roth, 64 C 946). Meadowbrook settled the claim by paying the trustees the sum of \$150,000, waiving its claim against the estate in the amount of approximately \$1,850,000 and assigning its rights on a March 11, 1963 agreement out of which the trustee received substantial monies.

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PARAGRAPHS 85-86

Paragraphs 85 and 86 claim reimbursement for Hahn's services in preparing and filing proofs of claim for Talcott pursuant to the direction of this court. For the reasons stated above the claim is denied and the trustee's objection sustained.

PARAGRAPHS 87-89

Paragraphs 87 through 89 make a claim for services relating to a penalty assessment levied against Talcott by the Internal Revenue Service because of Talcott's failure to withhold payroll taxes when it advanced money to Continental during the period March 1, 1963 to April 7, 1963. Though the assessment was levied because of the way Talcott made its advance, Hahn testified that the claim for services was made against the estate because "if it were not for the factoring arrangement or factoring relationship, no claim could have been made against Talcott so, I contend that the claim grew out of the Agreement." The court finds that Talcott failed to show either that these services were connected with the financing agreements or that they were rendered in aid of the administration of the estate. The objection of the trustee is sustained.

PARAGRAPHS 90-94

In paragraphs 90 to 94, Hahn describes his efforts to defend Talcott against the Trustee's claim that Talcott and other creditors were obligated to return to the trustee payments

made to the said creditors within the four months prior to the filing of the Chapter X petition.^{/18} These services rendered by Hahn were for the purpose of protecting Talcott's interest in the payments received, and this purpose conflicted with the interest of the general creditors. This proceeding was pending when heard by the Master (the trustee withdrew the preference claim as to Talcott on February 28, 1975). Talcott's right to reimbursement is no different than the rights of other creditors defending against the claim. The financing and factoring agreements cannot be construed to permit fees that would be improper under §243 of the Act. The objection of the trustee is sustained.

PARAGRAPHS 95-99

Paragraphs 95 to 99 claim reimbursement for legal services in resisting a claim by American Catalogue Company for payment of the sum of \$24,000 out of the proceeds of the sale of the Detroit route. Although the trustee does not contest this claim, which alleges 20 hours of work by Hahn and 50 hours of work by Abeson, the court through its experience and familiarity with these matters believes that the number of hours claimed is exaggerated.^{/19} The number of hours reasonably chargeable to the

/18

The trustee contended that these payments were void under 11 U.S.C. §96.

/19

Talcott's attorneys did not supply any documentation for the number of hours claimed; the only supporting evidence of the time spent were estimates made during the hearing.

debtors' estates on this matter does not exceed one-half of that claimed; accordingly the court awards Talcott payment for 10 hours of Hahn's time and 25 hours of Abeson's.

PARAGRAPHS 100-119

Paragraphs 100 to 119 relate to services rendered to the debtor with reference to the proceeds of the sale of the Miami vending route to Vending Unlimited, Inc., and the failure to discharge certain liens and in particular a lien claimed by General Electric Credit Corporation. Substantial services were rendered by Francis J. Ryan, Jr., a senior partner in the Hahn firm. The amount of time claimed for each item is set forth in Ryan's affidavit verified September 30, 1974 (Claimant's Ex.2222 in the hearing). Hahn testified that he supervised all the work. The Ryan affidavit estimates the time consumed to be 96 hours. Hahn claims 35 hours for discussion on strategy with Ryan "studying the pleadings and in conferences with the attorneys for the Franklin National Bank." (Tr.p.1019). I do not believe the debtor should be required to pay for the services of two senior partners performing the same work in tandem. Only conferences relating to the matter with the Franklin should be added to Ryan's allowance. The trustee conceded 96 hours of Ryan's time and 35 hours of Hahn's time. I find the estate should be charged with 96 hours of Ryan's time and 10 hours of Hahn's time.

PARAGRAPHS 120-125

Paragraphs 120 to 125 set forth a claim for services

rendered (pursuant to the authorization by the debtor in the agreement of August 14, 1963) in the determination and discharge of liens against the equipment and machines which were the subject of the sale of the Santa Ana, San Francisco or Buffalo routes. Hahn testified that services rendered concerning liens claimed by the First Pennsylvania Company and the First National Bank of Boston involved 4 or 5 separate checks (Tr.p.671). Other investigative services were performed by Talcott's employees; Hahn would pass on the validity of the claims after Talcott submitted the documents to him (Tr. p.684). Hahn estimated all the services, including those performed by Talcott's employees, amounted to 50 hours. Though the trustee appeared to challenge the right to reimbursement for any of these services and the number of hours as well, he did not object to the Master's award of 50 hours. The court finds that Hahn sustained the claim for not more than 25 hours for his services; Talcott is awarded reimbursement for 25 hours.

PARAGRAPHS 126-130

Paragraphs 126 to 130 refer to services rendered in connection with a proceeding brought by Automatic Canteen Company of America, in which it sought to declare the proceeds of the Hammond, Indiana vending route a trust fund for the benefit of creditors of Continental Lake Vendors Corporation, a wholly owned subsidiary of Continental. Automatic Canteen claimed that Continental's earlier merger with Continental Lake

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Vendors was a fraudulent conveyance in violation of the Bulk Sales Act of Indiana. The Master awarded Talcott reimbursement as claimed of 40 hours for Hahn and 250 hours for Abeson. The trustee did not object to the award. Once again, the court believes that the number of hours claimed here is exaggerated and notes that no supporting time records were offered by claimant. Since the number of hours reasonably expended on such work is no more than half of that claimed, Talcott is awarded 20 hours for Hahn and 125 hours for Abeson.

PARAGRAPHS 131-133

In paragraphs 131 to 133, Talcott makes a claim for services rendered by Hahn in preparing for depositions by various Talcott officers in the Wharton v. Roth action. This multi-claim suit against officers, directors, stockholders, counsel, accountants and financing institutions stated claims of widespread fraud and embezzlement of Continental's funds and dissipation of its assets. The pretrial examination of Talcott and its officers and employees familiar with numerous relevant transactions was fair ground in the preparation of the law suit. The examinations were only indirectly related to the financing and factoring agreements; they were related to the alleged wrongs of the defendants. ^{/20} The claim by Talcott for compensation for 60 hours

^{/20} The depositions related to the claims against Talcott itself. The claim for services would have been more obviously improper were Talcott a party defendant. Even though the claims against Talcott were released, the release did not relieve it of the obligation to give a pretrial deposition.

of Hahn's time, awarded by the Master, is denied. ^{/21}

PARAGRAPHS 134-151

Paragraphs 134 to 151 state Talcott's claims for reimbursement for services performed by Hahn and Ryan with reference to lawsuits by and against General Electric Credit Corporation begun in United States District Court for the Southern District of New York (later transferred to the Eastern District of New York) and in New York State Supreme Court, New York County. The trustee has not objected to the award of 35 hours for Hahn and 225 hours for Ryan. Ryan's services are specified and each item has a time estimate. Although Hahn claims 70 hours, his claim is no more than a general assertion of time spent. ^{/22} The court allows reimbursement for 10 hours for Hahn's services and 225 hours for Ryan's services.

PARAGRAPHS 152-158

In paragraphs 152 to 158, Talcott claims that services relating to the sale of the vending manufacturing machine business (including physical assets, patents, trademarks and goodwill) are chargeable to the debtors' estate. The trustee had

^{/21}

The trustee failed to object to the award.

^{/22}

Hahn estimated his services in supervising Ryan's work and conferences with the attorneys for Franklin consumed 35 hours (Tr.p.1019), and that 5 or 6 discussions with Talcott brought the total number of hours to 70.

entered into an agreement with the Kelsey, Hayes Company, subject to a higher offer at a public sale. All creditors were given notice of the sale. Hahn states that representatives of the Vendo Company approached Talcott officers and Hahn and indicated an interest in purchasing Continental's assets. Hahn attended court on the return day of the motion directing the sale. The sale was adjourned to July 6, 1964; Hahn attended on the adjourned date and proffered the Vendo offer, which was approved by the court. Talcott does not claim a finder's fee (Tr.p.644); rather, it claims that services were rendered to the trustee since "we [Talcott officers and Hahn] negotiated with Vendo and told them the form of offer we would recommend, bearing in mind ... that part of the consideration was property that was subject to our lien." The trustee was adequately represented in the negotiations and sale, both in legal and non-legal services. The Master was mistaken in finding that Talcott had received notice of the sale because of the factoring and financing agreement. The objection of the trustee is sustained.

PARAGRAPHS 159-160

Paragraphs 159 to 160 refer to services rendered by Hahn in effecting the repayment (in August 1964) of the loan of \$750,000, made to Continental in December 1963, out of the proceeds of the sale to Vendo. These services consisted of a request for repayment by letter, an acknowledgement of repayment, and the release of security pledged for the loan. The Master

found that these services "were part of the enforcement of the loan agreement" and that the loan was made "to protect security held by Talcott from deterioration." The court finds that the services performed were routine services to Talcott. The indirect benefit to Continental was one normally offered to borrowers. The objection of the trustee is sustained.

PARAGRAPHS 161-167

Paragraphs 161 to 167 describe various services under the caption Miscellaneous Services. The Master found the services rendered in all the paragraphs "part and parcel of these many difficult, complicated and intricate transactions" dealing with enforcement of the loan agreement. He reduced the claim of 335 hours to 175 hours as a penalty for failing to keep concurrent and accurate time records.

Paragraph 161 notes that Hahn was present^o in court on November 27, 1964, and December 11, 1964, when the trustee and counsel applied for interim allowances. Talcott and other creditors were interested in the allowances to the extent that the award of fees would affect their distributive share of the estate. Hahn testified that these court appearances are services which fall within the contractual authorization "because they may affect our eventual dividend which we might get on an unsecured claim." (Tr.p.1006). Talcott did not oppose the award of fees. The claim is denied.

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The allegations in paragraph 162 would charge the estate for Hahn's examination of the trustee's applications to the court for authorization to settle claims against third parties, i.e., Meadowbrook; Estate of Eric Johnson; Lybrand; Ross Bros.; and Montgomery; and for attending court hearings approving the settlements. Hahn suggested that the trustee sought him out and solicited his support (Tr.p.1020). The services claimed were routine services rendered to Talcott; they were informational rather than advisory legal services. The claim is denied.

Paragraph 163 requests reimbursement for examining 8-K and 10-K reports filed by Continental with the Securities and Exchange Commission. Since Continental sold its assets on July 10, 1964, no reports were required after early 1965 (Tr.p.1017). Hahn estimates the time spent examining monthly reports was "a minimum of 20 hours" (Tr.p.1017). These services were performed for Talcott and not for the trustee; the trustee had adequate legal and accounting services available. The claim is denied. Paragraph 164 claims additional services relating to those claimed in paragraph 163. The claim is denied.

Paragraphs 165 to 166 set forth services assisting Talcott in rendering monthly statements to the trustee. Hahn claims he spent about 125 hours (Tr.p.1026) over a period "beginning in July 1963 through 1964" during which he reviewed all the matters that were handled by the Hahn office and the Talcott office with the trustee and the Continental staff. Meetings

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initially took place every ten days or two weeks, and thereafter less frequently (Tr.p.1022). He testified he would meet with his associate Reuben Golin and also with Talcott when he would stop at Talcott's offices on his way to the law office (Tr.p.1025). These periodic conferences reviewed Talcott's financial position. In addition to a claim of 125 hours of telephone conversations with Talcott officials, the trustee and others, for the purpose of ascertaining whether the vending routes were being operated successfully. Since Talcott failed to show that the services were rendered to enforce collection of Continental's obligations or for the protection of the estate, this claim is denied.

Paragraph 167 is a general statement that "for at least the first ten months of deponent's activity on this matter, hardly a working day passed that deponent was not engaged in some phase of the matters in deponent's charge which affected Talcott's security position." This last paragraph, describing the nature of services rendered, is the underpinning of most of Talcott's claims for reimbursement for attorney's fees. Every event or transaction involving Continental, every proceeding in which the trustee was a party or in which the right to Talcott's security was in issue arguably affected Continental or Apco. Talcott cannot claim a right to reimbursement for legal services and expenses solely on the basis that an indirect effect on Talcott's security was involved.

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Talcott also claims reimbursement for the services outlined in Hahn's supplemental affidavit of March 16, 1973. ^{/23}

PARAGRAPHS 6-26

In paragraphs 6 through 26, Talcott claims that legal services performed in connection with the distribution of the proceeds of sale of four routes (Hammond, St. Louis, Detroit and Pittsburgh) are compensable out of the debtors' estate. These services included preparation of Talcott's proofs of claim, court appearances and meetings on behalf of Talcott to work out distribution formulas, double-checking of the trustee's accountants, and research on various legal problems involved. Talcott claims reimbursement for 200 hours of Abeson's time; the trustee conceded, and the Magistrate awarded, 100 hours on these matters. However, the court finds that the work claimed was performed for Talcott's benefit and duplicated the trustee's work; accordingly, this claim is denied.

PARAGRAPHS 21-27

These paragraphs set forth a claim for legal services incurred by Talcott in contesting and ultimately reducing the claim of another creditor, Automatic Canteen, to attorney's fees

/23

Talcott subsequently urged, in a memorandum submitted July 21, 1975, that the claims set out in paragraphs 28 through 43 be postponed until such time as the matters described therein were completed. For the reasons stated below, the court considers these claims now.

payable out of the sale proceeds of the Hammond route. The trustee conceded and the Master awarded repayment for 75 hours of Abeson's time in connection with this matter. These services are not compensable from the debtors' estate because they were undertaken for Talcott's benefit and not for the debtors; in fact, the affidavit states that Talcott benefited from these services to the extent of about \$18,000 additional recovery from the proceeds. The claim is denied.

PARAGRAPHS 28-33

Paragraphs 28 to 33 state a claim for legal services relating to Talcott's opposition to the confirmation of an amended plan of reorganization (Talcott objected to the feature of the plan which denied Talcott the right to extend the lien against one debtor to the assets of both debtors as consolidated). Talcott claimed reimbursement for 151 hours by Hahn and 579 hours by Abeson; the trustee objected and the Master awarded Talcott the hours claimed. Although Talcott's appeal from this court's approval of the plan was still pending at the time of the Master's report, the plan was since affirmed by a divided Court of Appeals, In re Continental Vending Machine Corp., 517 F.2d 997 (2d Cir.

^{/24}
1975). Attorney's fees incurred in opposing a plan of re-

^{/24}
Talcott's petitions for rehearing and for rehearing en banc were denied by the Second Circuit Court of Appeals (No. 74-2230, Sept. 16, 1975).

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organization are not compensable under §243 unless the opposition is successful. The claim is denied.

PARAGRAPHS 34-43

In paragraphs 34 to 43, Talcott claims reimbursement for attorney's fees relating to Talcott's application for payment of the trustee's certificates, the subsequent preparation of accountings, and of affidavits, etc., in support of the attorney's fees claimed in all the preceding paragraphs. Fifty-two and one-half of Hahn's time and 1,199 hours of Abeson's time are claimed. Over the trustee's objection, the Master awarded 52-1/2 hours for Hahn and 600 hours for Abeson. These services are not services which benefited the debtors' estates and thus are not chargeable against it. The claim is denied.

EXPENSES AND DISBURSEMENTS

Talcott claims \$101,705.38 for expenses incurred in enforcing collection of the debtors' accounts receivable and for services rendered incidental to the preservation and administration of the estate, for the period November 14, 1963 to December 21, 1971. At the hearing, the claim was reduced to \$95,645.38. The claim is set forth in the affidavit of George Fairberg, senior vice-president of Talcott, the testimony of Fred Goldberger, who was in charge of Talcott's analytical and auditing department, the testimony of Mark Rosenbaum, assistant vice-president of Talcott, and the affidavit of James Grady.

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The expense claim consists of 219 items listed in the schedule attached to the Fairberg affidavit.

The trustee concedes that \$57,163.79 of the claim is properly chargeable as an obligation of the estate related to the collection of monies due the estate. The Master allowed Talcott the full amount of the reduced claim, i.e., \$95,645.38. The trustee objects to \$33,210.05 of the claim on the ground that it represents services that were rendered by Talcott's special auditing staff in reviewing Continental's books of account and keeping a close check on the collateral, credit, etc., and argues that these services were not for the benefit of Continental. The trustee claims that it had performed these same services in running its business, and that the auditing services were rendered solely for the protection of Talcott's interest in Continental and duplicated services rendered to Continental by its own auditing staff. The trustee also objects to an award of \$4,271.54 labeled as "legal disbursements payable to the Hahn firm."¹²⁵

Items 29, 35 and 54 (totaling \$33,210.05) relate to expenses in using Talcott's special auditing staff at Continental's offices in November and December, 1963, and January 1964 (\$12,126.75); February 1964 (\$2,496.85); and March, April, May

¹²⁵

The Master found in favor of the claimant, "[E]ven though these disbursements have not been substantiated by documentary proof but supported by testimony and affidavits of reputable attorneys that the disbursements were a necessary incident to their professional services ..."

June and July, 1964 (\$18,586.45).

The testimony of Goldberger, Rosenbaum and Fairberg shows that on or about January, 1964, Continental's (and Apco's) accounts receivable amounted to about 4-1/2 million dollars and total sums due on all outstanding conditional bills of sales amounted to about 1-1/2 million dollars. The accounts receivable and conditional sales contracts were assigned to Talcott as collateral for the outstanding loans (Fairberg, Tr.1238). Approximately one-half of the accounts receivable were past due and about one-half of the conditional sales contracts were in default. Continental and Apco had financed vending machines in warehouses located at Westbury, Long Island, and other locations throughout the country (Goldberger, Tr.pp.1083-4). Talcott had reason to distrust Continental's books of account. When the Santa Ana, San Francisco and Buffalo routes were later sold, Talcott, acting on behalf of the trustee, was charged with the responsibility of discharging specific liens on the vending machines on the various routes and locating the vending machines in the premises of the various customers. During the period that the trustee manufactured and sold new and reconditioned vending machines, Talcott checked the credit of the purchases and financed the sales (Goldberger, Tr.p.1089). Inventorying the physical assets (vending machines), locating vending machines and merchandise belonging to the debtor, and pursuing collection of the accounts

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receivable were all services which were rendered in the preservation of the estate and an aid in administering the estate. The expenses were incurred within the authority of the financing and factoring agreements and \$243. The auditing expenses were necessary in the pursuit of these activities. The court is satisfied that the charges were based on I.B.M. time records (Rosenbaum, Tr.p.1140) which were lost. The auditing charges were not for the usual routine audits usually made by Talcott without charge (Rosenbaum, Tr.p.1180).

The trustee's objection to the award of \$33,210.05 is overruled.

Talcott failed to offer any proof that the claim for "legal disbursements" and miscellaneous analytical and auditing expenses, set forth in the items numbered 33, 39, 48, 58, 61, 71, 74, 83, 92, 105, 113, 188, 197, 207, 210, 215 and 218 of Exhibit A annexed to the Fairberg affidavit, were necessary or related to activities properly chargeable to the debtors' estate. Therefore, the objection of the trustee to an award of \$5,271.54 for these services is sustained; the total amount of expenses and disbursements allowed is \$90,373.84.

CONCLUSION

The court awards reimbursement to Talcott for 275 hours of services by Hahn, 321 hours of services by Ryan and

150 hours of services by Abeson; ^{/26} the court also awards \$90,373.84 for expenses and disbursements by Talcott. The total amount, \$119,108.84, is to be paid as of the date of this order, without interest. In re Yale Express Systems, Inc., supra, 366 F. Supp. at 1382.

It is

SO ORDERED

^{/26}

The rates of compensation for the attorneys, as established by the Magistrate, are adopted by this court: \$50 per hour for Hahn, \$35 per hour for Ryan and \$25 per hour for Abeson. The dollar amount awarded for attorney's fees, so computed, is \$28,735.00.

JUDGE MISHLER'S DECISION AND ORDER, NOVEMBER 18, 1975APPENDIXCOMPARISON OF HOURSMarch 14, 1975 Affidavit

<u>Affidavit Paragraph</u>	<u>Hours Claimed</u>	<u>Conceded by Trustee</u>	<u>Found by Master</u>	<u>Allowed by Court</u>
6-25	187 (Hahn)	0	187 (Hahn)	0
26-38	160 (Hahn)	104 (Hahn)	160 (Hahn)	115 (Hahn)
39-48	39 (Hahn)	0	39 (Hahn)	0
49-60	44 (Hahn)	0	44 (Hahn)	4 (Hahn)
	175 (Novick)		175 (Novick)	
	45 (associates)		45 (associates)	
61-74	93 (Hahn)	0	93 (Hahn)	0
77-84	81 (Hahn)	81 (Hahn)	81 (Hahn)	81 (Hahn)
85-86	15 (Hahn)	0	15 (Hahn)	0
87-89	5 (Hahn)	0	5 (Hahn)	0
	62 (Novick)		62 (Novick)	
90-94	10 (Hahn)	0	10 (Hahn)	0
	10 (Abeson)		10 (Abeson)	
95-99	20 (Hahn)	20 (Hahn)	20 (Hahn)	10 (Hahn)
	50 (Abeson)	50 (Abeson)	50 (Abeson)	25 (Abeson)
100-119	35 (Hahn)	35 (Hahn)	35 (Hahn)	10 (Hahn)
	96 (Ryan)	95 (Ryan)	96 (Ryan)	96 (Ryan)

(Continued)

JUDGE MISHLER'S DECISION AND ORDER, NOVEMBER 18, 1975

<u>Affidavit Paragraph</u>	<u>Hours Claimed</u>	<u>Conceded by Trustee</u>	<u>Found by Master</u>	<u>Allowed by Court</u>
120-125	50 (Hahn)	50 (Hahn)	50 (Hahn)	25 (Hahn)
126-130	40 (Hahn)	40 (Hahn)	40 (Hahn)	20 (Hahn)
	250 (Abeson)	250 (Abeson)	250 (Abeson)	125 (Abeson)
131-133	60 (Hahn)	0	60 (Hahn)	0
134-151	70 (Hahn)	35 (Hahn)	35 (Hahn)	10 (Hahn)
	225 (Ryan)	225 (Ryan)	225 (Ryan)	225 (Ryan)
152-158	40 (Hahn)	0	40 (Hahn)	0
159-160	6 (Hahn)	0	6 (Hahn)	0
161-167	335 (Hahn)	0	175 (Hahn)	0

March 16, 1975 Affidavit

6-19	200 (Abeson)	100 (Abeson)	100 (Abeson)	0
21-27	75 (Abeson)	75 (Abeson)	75 (Abeson)	0
28-33	151 (Hahn)	0	151 (Hahn)	0
	579 (Abeson)	0	579 (Abeson)	0
34-43	52-1/2 (Hahn)	0	52-1/2 (Hahn)	0
	1199 (Abeson)	0	600 (Abeson)	0

COMPARISON OF DOLLAR AMOUNTS

<u>Claimed</u>	<u>Conceded by Trustee</u>	<u>Found by Master</u>	<u>Allowed by Court</u>
\$267,490. ^{/27} ₅₈	\$40,360.00 ^{/28}	\$150,000.00 ^{/29}	\$28,735.00 ^{/28}

/27

This amount includes legal disbursements but not the expenses relating to auditing and miscellaneous charges detailed by the Fairberg affidavit.

/28

This amount is arrived at by computing number of hours x hourly rates listed in n.26, supra.

/29

The Magistrate arrived at this amount by adding a premium for "the quality of services rendered, the difficulty of the questions involved, the benefit to the estate and the professional standing of Talcott's attorneys, ..." to the amount determined from a computation of hourly rates. Master's Report at 35-39.

NOTICE OF TALCOTT'S MOTION FOR REHEARING
OF NOVEMBER 18, 1975 ORDER

PLEASE TAKE NOTICE that upon the annexed affidavit of Gabriel Schwartz, sworn to December 2, 1975, James Talcott, Inc. will submit to the Honorable Jacob Mishler, Chief Judge, at his Chambers, on the 3rd day of December, 1975, at 10:00 A.M., its cross-motion for a rehearing of this court's decision and order dated November 18, 1975 and on such rehearing to enter an order striking the said decision and order from the records of this court and declaring itself disqualified to sit on consideration of the subject matter of that decision and order, and for such other relief as is just.

SCHWARTZ' AFFIDAVIT SUPPORTING
TALCOTT'S MOTION FOR REHEARING

GABRIEL SCHWARTZ, being duly sworn, deposes and says:

1. He is Senior Vice President of James Talcott, Inc. He makes this affidavit on information furnished by Talcott's attorneys, in support of the instant cross-motion for the relief requested in the annexed notice of motion.

2. On February 13, 1973, this court denied Talcott's motion for an order directing the trustee to pay Talcott balances due on Conservator's and Trustees' Certificates. The court granted the trustee's cross-motion for an accounting by Talcott of moneys received on liquidation of Talcott's security.

3. On Talcott's appeal from that judgment, the Court of Appeals remanded for further proceedings and held, inter alia, that Talcott should file a proof of claim for its legal, auditing and miscellaneous expenses incurred on liquidation of its security. (491 F. 2d 813) Implementing the Court of Appeals' ruling, this court, on April 10, 1974, directed Talcott to file its proof of claim and it did so.

4. By memorandum of decision dated May 22, 1974, the court required Talcott to submit further proof of its claim

SCHWARTZ' AFFIDAVIT SUPPORTING
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by oral testimony or documents, and for that purpose referred the matter to United States Magistrate Catoggio, as Special Master, for hearing and report.

5. After numerous hearings before him, the Master, on April 28, 1975, filed his report on Talcott's proof of claim, allowing reimbursement to Talcott of \$150,000 for paid legal fees, \$95,645.38 for auditing, collection and miscellaneous disbursements and \$3,231.59 for legal disbursements.

6. On May 14, 1975, the trustee filed his objections to the report. On May 23, 1975, Talcott moved for an order confirming the report.

7. In addition to the proof of claim, the further proceedings on remand directed by the Court of Appeals involved what has been referred to as the Silco reserve issue, requiring interpretation of an agreement between Talcott and one of the debtors. Holding the agreement ambiguous, the Court of Appeals directed ascertainment of the parties' intent and surrounding circumstances.

8. On September 4, 1974, Judge Mishler recused himself on that Silco reserve issue and referred it to Judge

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Judd for the stated reason that he had "expressed an opinion concerning the intent of the agreement".

9. At a preliminary conference before Judge Judd on May 5, 1975, trustee's counsel indicated that he would call Judge Mishler as a witness for the trustee. Thereafter Talcott's counsel objected to calling Judge Mishler as a witness. Annexed hereto as Exhibit A is a copy of Talcott's attorneys' letter of May 30, 1975 to Judge Judd requesting a pre-trial conference to determine, among other things, the propriety of Judge Mishler's appearance as a witness and to arrange for his deposition if Talcott's objection were to be overruled.

10. At the pre-trial conference, the objection to calling Judge Mishler as a witness was overruled and the request for his deposition was denied.

11. A later request for an offer of Judge Mishler's proof was not honored. However, in a gratuitous three-page letter of June 25, 1975, Judge Mishler advised trustee's and Talcott's attorneys of his impressions and recollections of facts and circumstances bearing on the Silco reserve issue. He also suggested a trustee's defense on that issue. A copy of the

SCHWARTZ' AFFIDAVIT SUPPORTING
TALCOTT'S MOTION FOR REHEARING

letter is hereto annexed as Exhibit B.

12. At the morning session of an evidentiary hearing before Judge Judd on June 30, 1975, Talcott's counsel again pressed his objection to any testimony by Judge Mishler. The objection was overruled after a recess. The pertinent facts of the transcript (pp. 66-73) are incorporated herein by reference as Exhibit C.

13. Later on that date, Judge Mishler appeared before Judge Judd, testified on behalf of the trustee and was cross-examined by Talcott's counsel. The transcript of Judge Mishler's testimony (pp. 99-141) is incorporated herein by reference as Exhibit D.

14. In a memorandum supporting Talcott's motion to confirm the Special Master's report, the court was requested to defer decision until the court's determination of all applications for allowance in connection with closing of the reorganization proceeding. Without previously passing on the request, the court issued the decision and order of November 18, 1975, reducing Talcott's claim for legal fees from \$150,000, as recommended by the Special Master, to \$28,735.00.

SCHWARTZ' AFFIDAVIT SUPPORTING
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15. Talcott's proof of claim for reimbursement of legal fees, and the Special Master's report thereon, included compensation for services in connection with the Silco reserve matter, the very matter upon which Judge Mishler testified on June 30, 1975.

16. From the above-recited sequence of events, it is apparent that the report of the Special Master, Talcott's motion to confirm and the trustee's objection to the report were pending before Judge Mishler prior to his testifying, over objection, on the Silco reserve matter, and that the court nevertheless rendered its decision only after testifying as a material witness against Talcott. It is respectfully submitted that, by virtue of 28 U.S.C. §455, Judge Mishler should have disqualified himself from consideration of the Special Master's report, Talcott's motion to confirm and the trustee's objections thereto.

WHEREFORE, Talcott's cross-motion for the relief requested in the annexed Notice of Motion should in all respects be granted.

Note: Exhibit A - Talcott's counsel's letter, May 30, 1975, to Judge Judd - appears at 43a, supra.

Exhibit B - Judge Mishler's letter, June 25, 1975, to trustee's counsel - appears at 45a, supra.

Exhibit C - Colloqui before Judge Judd, June 30, 1975 - appears at 50a, supra.

Exhibit D - Judge Mishler's testimony before Judge Judd, June 30, 1975 - appears at 56a, supra.

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The trustee moves, and James Talcott Inc. (Talcott) cross-moves, for reargument of the court's memorandum of decision and order made and filed November 18, 1975.

The proceedings underlying these motions were triggered by Talcott's motion for an order directing the trustee to pay the alleged outstanding balance on Conservators and Trustee's Certificates. Under the terms of an agreement dated August 14, 1963, the trustee had sold three vending routes known as the Santa Ana, San Francisco, and Buffalo routes to Silco Automatic Vending Company for \$2,850,000 and Talcott had received the proceeds of the sale as the trustee's disbursing agent. Talcott claimed a portion of the proceeds as reimbursable legal, accounting and miscellaneous fees. The trustee disputed Talcott's claim to fees and cross-moved for an accounting. On February 13, 1973, the court issued a memorandum of decision and order denying Talcott's motion and directing Talcott to account for the monies representing that portion of the Silco sale that it had not yet applied in accordance with the agreement. The order directed Talcott to file its accounting on or before March 1, 1973, and in default thereof to pay over to the trustee the sum of \$750,000, which represented the approximate balance of the proceeds of the sale in Talcott's hands. Thereafter on Talcott's application, the court substituted a bond in the amount of \$600,000 for the payment directed.

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Talcott submitted its claim in the form of affidavits by J. Jacob Hahn, and supplemental affidavits, filed April 30, 1974.^{/1} On May 22, 1974, the court found the proof claim insufficient and referred the matter to United States Magistrate Catoggio to hear and report. Magistrate Catoggio filed his report on April 28, 1975. On May 15, 1975, the trustee filed his objections to the report. On May 23, 1975, Talcott moved to confirm the report. The Magistrate's report found Talcott entitled to reimbursement in the sum of \$248,876, for attorney's fees and disbursements. This court, in a memorandum of decision filed November 18, 1975, reduced the sum to \$119,107.84.^{/2}

The Court of Appeals in In re Continental Vending Machine Corp., 491 F.2d 813 (2d Cir. 1974), found that the expression of the parties' intent in the agreement of August 14, 1963, was ambiguous and subject to testimony with reference to the application of the proceeds of the sale. Since the undersigned had previously expressed an opinion on the issue of intent and had stated that its meaning was clear and unambiguous, the undersigned recused

^{/1} Talcott in the meantime appealed the order. The Court of Appeals affirmed the order directing Talcott to submit proof of ". . . legal auditing and collection expenses in connection with the liquidation of its security. . . ." 491 F.2d 813, 814 (2d Cir. January 22, 1974).

^{/2} The court found Talcott was entitled to legal fees in the amount of \$28,735, and auditing and miscellaneous expenses in the amount of \$90,373.84.

JUDGE MISHLER'S DECISION AND ORDER,
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himself on September 4, 1974, and assigned the matter to Judge Judd for determination. The undersigned was called by the trustee to testify in the proceeding before Judge Judd on June 30, 1975. Prior to testifying and on June 25, 1975, the undersigned wrote both parties, advising them of the nature of the testimony.

The trustee's motion asks this court to amend and modify its decision and order of November 18, 1975, by (1) making a determination on Talcott's claim for reimbursement (Exhibit E) which the Magistrate permitted Talcott to withdraw and claim at a later day; (2) allocating the award for legal fees between the debtors, i.e., Continental and Apco; and (3) clarifying the paragraph captioned "Conclusion" wherein the court stated "the total amount is to be paid as of the date of this order, without interest."

By its cross-motion, Talcott seeks (1) disqualification of the undersigned under 28 U.S.C. §455, and Talcott opposes (1) determination of the claim made in Exhibit E at this time, and (2) allocation of the legal expenses between the debtors. Talcott agrees that the direction for payment requires clarification, but on a premise different than that assumed by the trustee. /_3

/3 Talcott's brief states that the court's direction was that the trustee pay out of the estate. The brief states, "the allowance is a charge upon Talcott's security, not against the estate, a basic point apparently overlooked by the court throughout the decision." The court used the language referred to above not as a direction to pay but rather to fix the date from which interest shall be computed on the obligation.

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DISQUALIFICATION

The pertinent portion of 28 U.S.C. §455 provides:

Any . . . judge of the United States shall disqualify himself in any case in which he . . . is or has been a material witness

Talcott urges that because the undersigned testified before Judge Judd on the Silco matter, the undersigned is disqualified under this section from ruling on Talcott's application for reimbursement of attorney's and related fees incurred during the entire course of these bankruptcy proceedings, from 1963 to the present. Talcott has failed to cite a single case supporting its contention,^{/4} and this court's research discloses none. The court finds that this suggested interpretation of §455 is without merit. To accept it would be to nullify a central concept of Chapter X: that a district judge constantly scrutinize the corporate reorganization proceedings.^{/5} In fact, since the undersigned has been the sole district judge supervising the more than twelve years of litigation in this case (with the exception of the Silco matter assigned to Judge Judd), he is the only judge fully informed on

^{/4} Talcott's reliance on United States v. Amerine, 411 F.2d 1130 (6th Cir. 1969) is misplaced. There, the district judge who was the United States Attorney when the indictment was returned was "of counsel" to the government as a matter of law, 28 U.S.C. §547. Disqualification followed automatically under §455.

^{/5} J. Moore & R. Oglebay, Collier on Bankruptcy, ¶0.08 & 0.09 (14th ed. 1972).

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the proceedings to which Talcott's claim for fees relate, and
hence on the merit of the claims.^{/6}

Furthermore, the issue on which this writer testified before Judge Judd is unrelated to the issue of entitlement to fees. In the event Talcott prevails on the issue of the Silco reserve, this court's obligation to award fees would be unaffected by the issue thus resolved. This writer became a witness in the Silco matter by virtue of negotiations he conducted and it is doubtful that this writer's disqualification from deciding that issue was mandatory.^{/7}

^{/6} In United States v. Re, 372 F.2d 641, 645 (2d Cir. 1967), the court commented in a similar vein in rejecting a petitioner's claim based on a judge's familiarity with facts in the proceedings as follows:

. . . We need not decide the extent to which considerations of efficient judicial administration and particularly "the purpose of section 2255 . . . permit the trial judge because of his familiarity with the proceedings and ability to supplement the record" may limit the scope of section 455.

^{/7} In Fortner and Perrin Inc. v. Smith, 327 F.2d 807 (9th Cir. 1964), a bankruptcy referee expressed an opinion on a matter that later came on before him for determination. The court did not find disqualification mandatory though it suggested that it is better for a judge to disqualify himself.

In Panico v. United States, 412 F.2d 1151 (2d Cir. 1969), cert. denied, 397 U.S. 921, 90 S.Ct. 901 (1970), in a §2255 application to set aside the conviction on the ground that petition was incompetent at time of trial, the district judge announced that he had observed the petitioner during the trial and that petitioner was faking emotional or psychological disorder. The court held it was not error for the district judge to refuse to disqualify himself. To the same effect, see United States v. Smith, 337 F.2d 49 (4th Cir. 1964), cert. denied, 381 U.S. 916, 85 S.Ct. 1542 (1965).

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DEFERRAL OF EXHIBIT E CLAIM AND APPORTIONMENT

Talcott argues that this court should not overrule "the Special Master's finding for deferral" on the issues of the claims made in Exhibit E and of apportioning the fees awarded as between the two debtors. This argument reverses the actual state of things, since in finding for deferral, it was the Magistrate who failed to follow the order of this court directing a hearing on all the matters within the claim.

There is little reason to withhold apportioning the award. If Talcott succeeds in its application for certiorari and the Supreme Court reverses the Court of Appeals' approval of the confirmed plan, the apportionment will do no practical harm.

THE EXHIBIT E CLAIM

This court set forth the guidelines governing creditor's claims for reimbursable fees and expenses in its memorandum of decision. The Second Circuit Court of Appeals recently restated these guidelines in In re American Express Warehousing, Ltd., ___ F.2d ___, No. 75-5006 (2d Cir. November 25, 1975) when expressing concern over high administrative costs:

Our decision in In Re Sapphire Steamship Lines, Inc., 509 F.2d 1242 (2d Cir. 1975), in part at least, reflects concern over the high cost of administering a bankrupt's estate. There, we set forth three strict requirements before a creditor's attorney could be awarded fees from the estate of a bankrupt; (1) the trustee or debtor in possession must have refused or neglected to act; (2) by proceeding in his stead, the creditor's counsel must have conferred a tangible benefit upon all the creditors; and (3) the attorney must have secured prior court authorization to act in place of the trustee or debtor in possession.

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Slip Op. at 664.

Footnotes 14 and 15 of the opinion (Slip Op. at 670) are also significant here. Footnote 14 states that a court should not award counsel fees in ". . . a case in which counsel's actions redounded principally to the benefit of its own client"

Footnote 15 observes:

In support of its \$800,000 request, the [creditors' committee] proffered an affidavit containing merely a general description of the services it had rendered and the total number of hours for which the law firms sought compensation. A claim of this magnitude could not properly have been granted upon such a vague and insubstantial showing. See In re Hudson & Manhattan RR Co., 339 F.2d 114 (2d Cir. 1964), In re Wal-feld Co., 345 F.2d 676 (2d Cir. 1965), cf. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974).

The \$6,544.08 claim set forth in Exhibit E consists of seven items. Two of these items cover "legal disbursements" of \$549.16 which the trustee contends represent printing costs related to Talcott's unsuccessful appeal of this court's confirmed plan. This court can make no award under 11 U.S.C. §243 for unsuccessful
/8
opposition to a plan of reorganization.

There are also three other items in Exhibit E, of \$440.00, \$126.01 and \$175.00 which are captioned "legal fees" or "legal disbursements" without further proof of how they contributed to the confirmed plan or to the administration of the debtor's estate.
/9
These items are not recompensable under §243

/8 See this court's Memorandum of Decision and Order of Nov. 18, 1975 at 7, 28-29.

/9 Id. at 5.

JUDGE MISHLER'S DECISION AND ORDER,
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There remain two other items, one for \$100.00 travel expense for a witness who testified before the Magistrate, and the other for \$4,500.00, representing the premium for the \$600,000 bond posted by Talcott in connection with its account (see supra, pp. 1-2). Neither of these expenses are compensable under §243 because they were incurred for Talcott's benefit and not for that of the debtors.
/10

ALLOCATION OF FEES ALLOWED

Other than urging deferral of the allocation, Talcott did not oppose the allocation as suggested by the trustee. The court having found no reason to defer the allocation it adopts the trustee's contentions as follows:

The fees listed below are chargeable against the estate of the debtor Continental:
/11

115 hours by Hahn	(¶¶26-38)	(\$5,750)
36 hours by Hahn	(¶¶75-77)	(\$1,850)
10 hours by Hahn and 25 hours by Abeson	(¶¶95-99)	(\$1,125)
10 hours by Hahn and 96 hours by Ryan	(¶¶100-119)	(\$3,860)
25 hours by Hahn	(¶¶120-125)	(\$1,250)
20 hours by Hahn and 125 hours by Abeson	(¶¶126-130)	(\$4,125)
10 hours by Hahn and 225 hours by Abeson	(¶¶134-151)	(\$8,275)

/10 Id. at 5-6, 30.

/11 Paragraph numbers refer to those of Hahn's affidavits supporting Talcott's claim; see the Appendix to this court's Memorandum of Decision and Order of Nov. 18, 1975.

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The fees listed below are chargeable against the estate of the debtor Continental Apco:

4 hours by Hahn	(¶¶49-60)	(\$ 200)
45 hours by Hahn	(¶¶78-84)	(\$2,250)

Thus the total allocated against Continental is \$26,285, and the total allocated against Continental Apco is \$2,450.

CLARIFICATION OF THIS COURT'S ORDER

As noted earlier, this court's order of November 18, 1975, was made with the intention of fixing the date from which interest would be computed on the amount representing Talcott's fees and expenses as allowed by this court.

Payment of the fees and disbursements fixed in this court's order of November 18, 1975, is stayed until Talcott has accounted for all the proceeds of the Silco sale. The award shall be a charge against the proceeds; in the event the balance of the proceeds are insufficient, the trustee shall pay the unpaid portion.

The findings and determination of the memorandum of decision and order of November 18, 1975, are amended and modified by this memorandum of decision, and as modified are in all respects confirmed.

1 Copies Received
Date March 31, 1976
Firm Joseph J. Marchese, Esq.
By [Signature]